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June 24
HOWARD'S
PRACTICE REPORTS

CONTAINING CASES UNDER THE
CODE OF CIVIL PROCEDURE AND
THE GENERAL PRACTICE

OF THE
STATE OF NEW YORK,
SELECTED FROM
DECISIONS OF ALL THE COURTS,

93

WITH NOTES,
BY R. M. STOVER.

WITH A BRIEF DIGEST OF ALL POINTS OF PRACTICE CONTAINED IN THE
STANDARD NEW YORK REPORTS ISSUED DURING THE
PERIOD COVERED BY THIS VOLUME.

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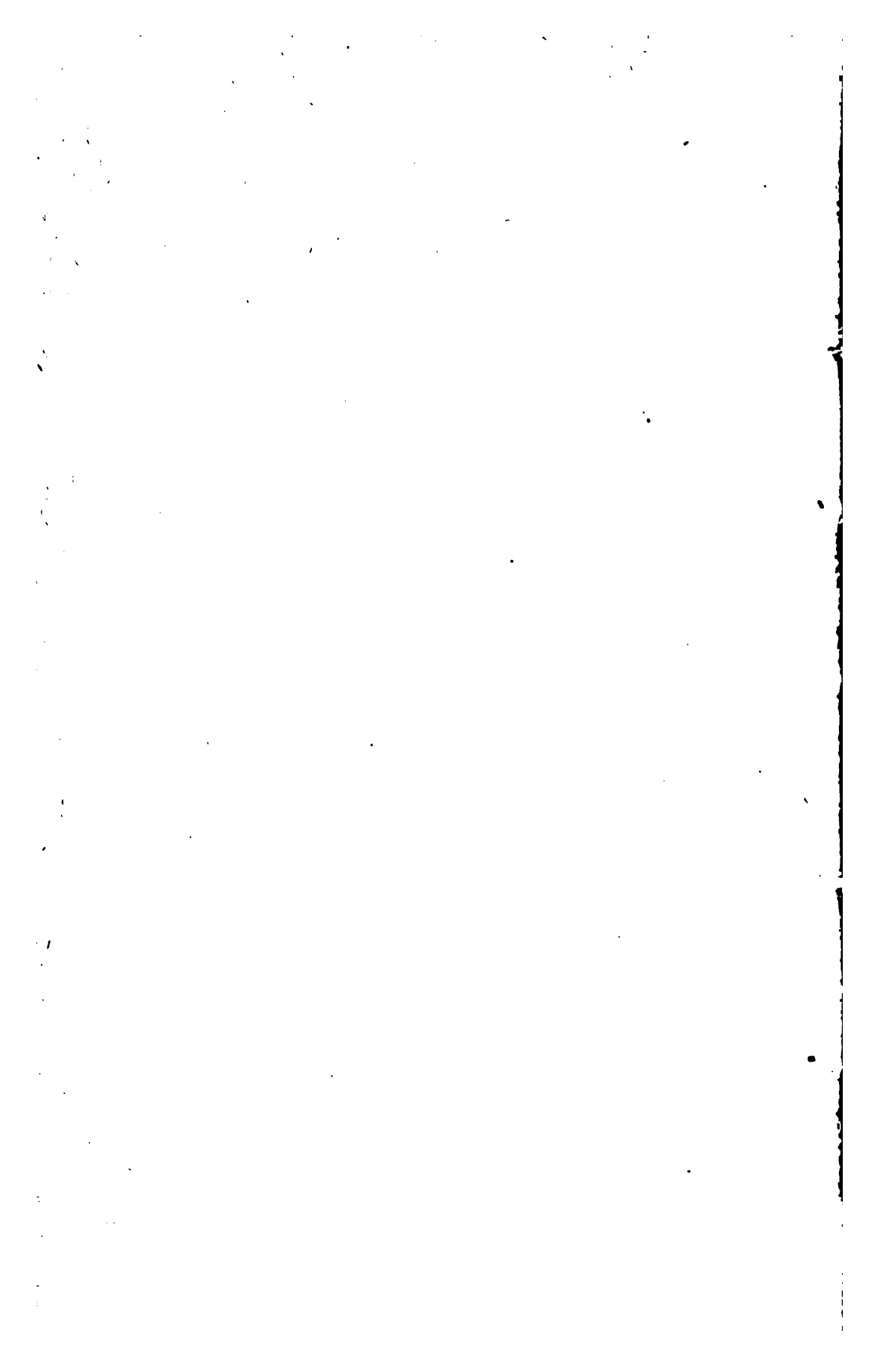


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NEW SERIES.

SUPREME COURT.

SAMUEL BORD, administrator of, &c., of FREDERICK BORD,
deceased, agt. THE NEW YORK CENTRAL AND HUDSON
RIVER RAILROAD COMPANY.

*Costs—Extra allowance in actions for causing death by negligence, &c.—
Upon what shall the allowance be computed—Code of Civil Procedure, sec-
tions 1902, 1904, 3253.*

In an action brought under section 1902 of the Code of Civil Procedure,
by an administrator to recover compensation for the death of a son of
the deceased father, in a difficult and extraordinary case, an extra
allowance may be made, and should be computed not upon the amount
of the verdict only, but upon such amount with interest added from
the date of the death.

In actions of this character "the sum *recovered*" is not only the amount
of the verdict, which represents only the judgment of the jury as to
what would be a "fair and just compensation for the pecuniary injuries"
to the plaintiff, but also the interest upon such amount from the date
of the death.

That such interest is required by express statutory enactment (*Code of
Civil Procedure, sec. 1904*) to be added, does not make such addition
anything other or different than a part of "the sum recovered."

Rensselaer Circuit, September, 1884.

MOTION for an extra allowance.

R. A. Parmenter and F. J. Parmenter, for plaintiff.

E. L. Fursman, for defendant.

WESTBROOK, J.—The plaintiff, after a severe contest at the
present circuit, recovered a verdict of \$2,000, in the above
entitled cause.

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The action was brought under section 1902 of "the Code of Civil Procedure" to recover compensation for the death of a son. The plaintiff moved for an extra allowance under section 3253, and asked that it be computed upon the sum awarded by the jury, with the interest thereon added from the date of the decedent's death (*January 19, 1877*), which interest the clerk is required by section 1904 to "add to the sum awarded" by the jury, "and include it in the judgment." The defendant conceded the case to be "a difficult and extraordinary" one, and that an allowance was proper, but insisted that it should be computed upon the amount of the verdict only.

The question which this motion presents therefore is, upon what shall the allowance be computed, upon the amount of the verdict only, or upon such amount with interest added from the date of the death?

The language of the section (3253) giving the allowance, and which is applicable to this case, requires it to be computed "*upon the sum recovered*." The claim of the plaintiff was that "*the sum recovered*" is the amount of the damages which he recovers by the action; while the claim of the defendant is that the expression only refers to the amount awarded by the verdict. The point involved has not been directly decided to my knowledge, and must therefore be treated as an original question.

In an action of this character, when the plaintiff recovers, the jury, the court, or the referee, to whom the question is submitted, may award "such a sum, not exceeding five thousand dollars," as they or he deem or "deems to be a fair and just compensation for the pecuniary injuries, resulting from the decedent's death, to the person or persons for whose benefit the action is brought." The same section of the Code (1904), from which the quotation has just been made, further provides: "When final judgment for the plaintiff is rendered, the clerk *must* add to the sum so awarded interest thereupon from the decedent's death, and include it in the judgment. The inquisition, verdict, report or decision may

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specify the day from which the interest is to be computed; if it omits so to do, the day may be determined by the clerk upon affidavits."

From the section of the Code just referred to it seems reasonably clear that "the sum *recovered*" in this action is not only the amount of the verdict, which represented the judgment of the jury as to what would be "a fair and just compensation for the pecuniary injuries" to the plaintiff "resulting from the decedent's death," but also the interest upon such amount from the date of the death. That such interest is required by express statutory exactment to be added does not make such addition anything other or different than a part of "the sum recovered." If the Code had authorized the jury to make the interest a part of the verdict, and that in fact had been done, the point that the allowance should be confined to the jury's estimate of the "pecuniary injuries" resulting from the death would not probably have been made. That the Code has by plain words made the interest a part of "the sum recovered," and has not left its allowance or non-allowance to the discretion of the jury, cannot alter or change the words of section 3253. That section does not provide that the allowance shall be based upon the amount of a verdict, a decision of a court, or the report of a referee, but "upon *the* sum recovered." In other words, the allowance shall be made upon the damages which are awarded to the party by the action. These damages may be such only as a jury, a court or a referee may compute, or may be given solely by statute, or may depend, as in this case, partly on both; but, whether given in either of the ways mentioned, so long as they represent "*the* sum recovered," that sum, and no other, is the one upon which the allowance is to be computed.

The order in this case will be that the allowance granted shall be computed upon the verdict with the interest added from the date of the decedent's death. The allowance in this case will be at the rate of five per cent, because that rate in this particular case is not too much. If the basis of the

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allowance will yield in some future case too large a sum, the rate is in the discretion of the court. The only point now decided is that the expression, "the sum recovered," used in section 3253 of the Code, includes and covers all the damages awarded to a party, and recovered by him in an action.

CITY COURT OF NEW YORK.

ANDREW STAAB agt. WALTER H. SHUPE *et al.*

Undertaking on arrest — When sureties liable — Code of Civil Procedure, sections 549, 559, 1487.

In an action against the sureties on an undertaking on arrest, where the nature of the cause of action and the right to the order of arrest are identical, commenced upon the vacating of the order of arrest, but before the termination of the action in which the order of arrest was granted:

Held, that the sureties were not liable on the undertaking until judgment was rendered in the action for defendant.

Also, *held*, that the undertaking carefully distinguishes between the cases where the right to arrest is identical with, and those where the right to arrest is extrinsic the cause of action; that in the one case the right to the order is determined by the fact that the plaintiff recovered judgment; in the other, the right to the order of arrest is determined upon motion, and if the vacated order is unreversed, it is a "final decision that the plaintiff was not entitled to the order of arrest" (*Schuyler agt. Englert*, 14 *Weekly Dig.*, 571, *followed*).

General Term, October, 1884.

Before McADAM, C. J., NEHRBAS and HYATT, JJ.

MOTION for judgment on verdict directed for defendants, subject to the opinion of the general term.

H. N. Walker, for plaintiff.

George W. Stevens, for defendant.

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BY THE COURT.—Upon the trial the issues involved were apparently turned into a question of law as to whether the plaintiff or defendant was, on the conceded facts, entitled to a verdict. No question as to the amount of damages recoverable in case the plaintiff was entitled to a verdict was made, and we assume, therefore, that the amount alleged in the complaint was conceded to be the legal measure (*See McKenzie agt. Farrell*, 4 *Bosw.*, 193; *Porter agt. Loback*, 2 *id.*, 188). No point as to the amount of damages recoverable was made upon the argument. The sole question presented and discussed was whether the action was maintainable—a legal proposition depending upon the construction to be placed upon the language of the undertaking sued upon. The trial judge directed a verdict in favor of the defendant, subject to the opinion of the general term. Under this direction both parties move for judgment on the verdict, so that the question presented to us is which party is entitled to final judgment on the uncontradicted facts (*Durant agt. Abendroth*, 69 *N. Y.*, 148). According to the language of the undertaking, the sureties were to become charged on the happening of either of two contingencies. These are stated, in the language of the instrument, to be “if the defendant do recover judgment therein”—that is, in the action; or, if it is finally decided that the plaintiff was not entitled to the order of arrest. The second contingency has happened, to wit, it has been decided that the plaintiff was not entitled to the order of arrest, and this decision having terminated the provisional remedy invoked, and, being unreversed, is in its nature final. If the legislature intended that the liability of the sureties should be made dependent upon the final result of the action, the second contingency as to a decision holding the plaintiff was not entitled to the order of arrest was an unnecessary and meaningless provision to insert in the statute. The undertaking is in the language of the statute (*Code*, sec. 559), and the form and liability are the same whether the arrest was granted on the cause of action or on facts extrinsic to it. Suppose the plain-

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tiff sued the defendant for \$25,000, and at the time of commencing the action procured an order of arrest bailable in that amount, and the action eventuated in a verdict in favor of the plaintiff for fifty dollars, it being apparent that his cause of action was only for that amount, and the defendant, after languishing in jail, finally succeeded in setting aside the order of arrest for irregularities in the papers upon which it was granted, would any one hold that because the defendant had failed to recover judgment in his favor, that he was without remedy upon the undertaking? We think not. The rule of construction is to give effect to every part of an instrument, and to every part of a statute, and we find nothing in the statute which changes the legal effect of the undertaking provided for by section 559 (*supra*). The order of arrest was vacated "because granted on defective papers." A verdict that the plaintiff was entitled to recover upon the cause of action alleged in his complaint would not be a final decision that he was entitled to an order of arrest on "defective papers," yet if a defendant be illegally arrested he is not without a remedy for the wrong. If a plaintiff desires to restrain his debtor's liberty, he must observe the forms and requirements of the law or take the consequences. The fact that the debtor was discharged on defective papers does not relieve the sureties. It might affect the measure of their liability, but the extent of their liability was not contested upon the trial, and is not before us for review.

Sedgwick on Damages (6th ed., in note 2, at p. 488), says: "In suits on statutory undertakings and bonds given to secure a defendant against damages and costs resulting from an attachment, injunction or other provisional remedy wrongfully issued or applied, the measure of damages is substantially indicated by the terms of the instrument as authorized by the statutes, and is the actual expense and loss occasioned by the writ or order, excluding remote damages."

The damages in this case would have included the ten dollars costs allowed on setting aside the order, with the reasonable

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counsel fees paid for setting aside the order (*Id.*, p. 488). These were not dependent on the result of the action and were recoverable no matter how it terminated. If a second order of arrest had been applied for, it would have been obtained on new papers, including a new undertaking on which new liabilities would have been created. It has been urged by the defendant that if he succeeded in obtaining judgment in the original action he may then arrest the defendant. This result may follow, but the arrest will not be upon the provisional order which has been vacated, but upon an execution against the person, to be issued on the judgment according to section 1487 of the Code. We do not see that this circumstance affects the question before us for decision, and are of opinion that the plaintiff is entitled to judgment on the verdict.

The plaintiff did not await the judgment he expects, but invoked the provisional remedy by arrest on order, prior to the trial. He failed to sustain it, and the decision vacating the order of arrest terminated that remedy and is final.

The case of *Schuyler agt. Englert* (14 *Weekly Dig.*, 571), although not involving in a direct manner the question presented to us for decision, contains language which compels us to halt. It certainly indicates in a forcible manner that our construction of the undertaking is wrong, and that the defendants are entitled to judgment on the verdict. In that case, the court holds that "the undertaking carefully distinguishes between the cases where the nature of the cause of action gives the right to the order of arrest, and those where the order is obtained upon facts outside of the cause of action. In the one case the right to the order is determined by the fact that the plaintiff obtained judgment; in the other case the right to the order is determined upon motion, and if an order setting aside the order of arrest is not vacated or reversed it is thereby decided that the plaintiff is not entitled to the order of arrest; and the conditions of the undertaking is fulfilled."

In the present case it was admitted that the action was one

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of those mentioned in section 549 of the Code, in which the right to the arrest depends on the nature of the cause of action, and not on extrinsic ground. In view of *Schuyler agt. Englert (supra)*, which we regard as binding upon us, we disregard our own views and accept those laid down in the case cited, and upon the authority of that case, we order judgment for the defendants on the verdict, with costs.

SUPREME COURT.

THE PEOPLE OF THE STATE OF NEW YORK agt. MICHAEL
NEWELL.

Naturalization — Alien — Effect of marriage of an alien widow with a naturalized citizen of the United States upon herself and infant children.

Upon the marriage of an alien widow with a naturalized citizen of the United States, she, as well as her infant children residing in this country become *ipso facto*, naturalized citizens of the United States; and as such, entitled to all the rights and privileges of said citizenship as fully as though naturalized by the judgment of a court of competent jurisdiction. Various statutes and authorities on the subject of naturalization reviewed and commented on.

Erie Circuit, September, 1884.

ACTION in the nature of a *quo warranto* to remove the defendant from the office of commissioner of police of the city of Buffalo.

Denis O'Brien, attorney general, and *James M. Humphrey*, for people.

Day & Rohmer, for defendant.

CORLETT, J. — The defendant, Michael Newell, was born in Ireland of Irish parents on the 31st day of July, 1848. His father and mother emigrated to the United States in 1850 or

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1851. The defendant came over soon after in charge of a relative of the family. On the 13th day of May, 1856, his father was accidentally killed on a railroad in the city of Buffalo. For some time before his death he had resided with his family, including the defendant, in Saratoga county. On the 13th day of August, 1861, the defendant's mother married Thomas Reagan, who was then an alien. Afterwards and on the 4th day of October, 1864, said Thomas Reagan was duly naturalized in the superior court of Buffalo. The defendant at that time was sixteen years of age, residing with his mother and her husband in Buffalo, where he has so continued to reside ever since, and has always been a resident of the state of New York ever since he came from Ireland.

Section four of chapter 359 of the Session Laws of 1883, which took effect on the first Monday of May of that year, is as follows: "Immediately after this act shall take effect, the mayor of said city shall appoint two *citizens* of said city, one from each of the two principal political parties, as commissioners of police, and in all appointments hereafter made the non-partisan character of said board shall be preserved and maintained. The said commissioners shall be electors and residents of the city of Buffalo, and before entering upon the duties of their office shall subscribe and take before the city clerk of the city of Buffalo the oath required by the constitution for judicial officers, which oath shall be filed in the office of the said city clerk. The commissioners shall hold their office for the term of four and six years respectively, and until their successors shall be qualified and enter upon the duties of their office. The mayor shall designate the term for which said commissioners are appointed, and the commissioner having the longest term to serve shall be known as the acting commissioner."

Under this act, John B. Manning, who was then mayor of the city of Buffalo, appointed two commissioners, one of whom was the defendant, and designated his term as the longest; so that he became known as the "acting commis-

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sioner." Under this appointment the defendant took the proper oath and entered upon the discharge of the duties of his office, and has since acted in that capacity and received the emoluments of the office. The people challenge the defendant's title to the office upon the claim that he was and is not a citizen of the United States, and therefore ineligible, and an intruder. The defendant's contention is that the above facts establish his citizenship and eligibility. A determination of this case requires an examination of the following provisions of the United States Revised Statutes:

SEC. 1994. "Any woman who is now or may hereafter be married to a citizen of the United States, and who might herself be lawfully naturalized, shall be deemed a citizen."

SEC. 2172. "The children of persons who have been duly naturalized under any law of the United States, or who previous to the passing of any law on this subject by the government of the United States, may have become citizens of any one of the states under the laws thereof, being under the age of twenty-one years at the time of the naturalization of their parents, shall, if dwelling in the United States, be considered as citizens thereof, and the children of persons who now are or have been citizens of the United States, shall, though born out of the limits and jurisdiction of the United States, be considered as citizens thereof. But no person heretofore proscribed by any state, or who has been legally convicted of having joined the army of Great Britain during the revolutionary war, shall be admitted to become a citizen without the consent of the legislature of the state in which such person was proscribed."

SEC. 2167. "Any alien, being under the age of twenty-one years, who has resided in the United States three years next preceding his arrival at that age, and who has continued to reside therein to the time he may make application to be admitted a citizen thereof, may, after he arrives at the age of twenty-one years, and after he has resided five years within the United States, including the three years of his minority,

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he admitted a citizen of the United States without having made the declaration required in the first condition of section 2165. But such alien shall make the declaration required therein at the time of his admission, and shall further declare on oath, and prove to the satisfaction of the court, that for two years next preceding it has been his *bona fide* intention to become a citizen of the United States, and he shall in all other respects comply with the laws in regard to naturalization."

Section 1994 was enacted on the 10th day of February, 1855. Section 2172 was approved on the 14th day of April, 1802, and section 2167 was reproduced from an act passed on the 26th day of May, 1824. All of them were made a part of the Revised Statutes enacted on the 20th day of June, 1874. Section 1994 was considered and construed in December, 1868, by the supreme court of the United States in *Kelly agt. Owen* (7 Wallace, 496). It there appeared that one Miles Kelly, a native of Ireland, emigrated to the United States and settled in the District of Columbia. In 1853 he married Ellen Duffy, and in 1855 was naturalized. He died in the city of Washington in March, 1862, intestate and without issue, leaving considerable real estate. His widow Ellen survived him. She had two sisters. Ellen Owen, who arrived in the United States in 1856 and was married to Edward Owen in 1861. He was naturalized in 1835, and Margaret Kahoe, who arrived in the United States in 1850, married James Kahoe in 1852, and he was naturalized in 1854. It thus appears that the husbands of two of the sisters were naturalized after their marriage, and the other before her marriage. The controversy was between the widow and her two sisters in relation to the real estate left by Duffy. The court decided that the act conferred the privilege of citizenship upon women married to citizens of the United States, if they were of the class of persons for whose naturalization previous acts of congress provided, and that the term "married" did not refer to the time when the ceremony of marriage was celebrated, but to a state of marriage. That it was therefore immaterial whether the husband became

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a citizen after or before his marriage. In the one case the one became a citizen when she married; in the other, when her husband became naturalized. The facts in that case rendered it necessary for the court to decide the question, as the naturalization in two cases was after the marriage, and in one case before. The words "who might herself be lawfully naturalized" mean any woman being a free white person, and not an alien enemy (*Kane agt McCarthy*, 63 *N. C.*, 299; *Leonard agt. Grant*, 5 *Federal Rep.*, 11; *Pequignot agt. The City of Detroit*, 16 *Federal Rep.*, 211.)

In *Burton agt. Burton* (1 *Keyes*, 359), decided in 1864, it was held that the alien widow of a naturalized citizen of the United States, although she never resided within the United States during the lifetime of her husband, was nevertheless a citizen and entitled to dower in his real estate. The doctrine of the above cases has been uniformly recognized and acted upon by the courts of this state (*Luhre agt. Eimer*, 80 *N. Y.*, 171; *affirming*, 15 *Hun*, 399; *Renner agt. Müller*, 57 *How. Pr. R.*, 229; *Weiland agt. Renner*, 65 *id.*, 245).

It is therefore settled beyond controversy that the defendant's mother became a citizen of the United States on the 4th day of October, 1864, on the naturalization of her husband, Thomas Reagan. The question of the effect of his mother's citizenship upon the defendant will now be considered. In *Campbell agt. Gordon and wife* (6 *Cranch's R.*, 176), decided in the supreme court of the United States in February, 1810, it appeared that James Curry, a citizen of Virginia, died on the 23d day of April, 1807, intestate and without issue, leaving considerable real estate. His brother, William Curry, was a subject of the king of Great Britain, but prior to the 14th day of October, 1795, he became a resident of the United States, and on that day was naturalized. He had one daughter, Janette, who was born in Scotland but came to the United States in October, 1797, while an infant, during the life of her father, and that she afterward continued to reside in Virginia. It became necessary to decide whether she was a citizen capa-

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ble of taking her uncle's land by inheritance. The court unanimously determined the question in her favor, holding that the naturalization of her father while she was an infant made her a citizen.

In *The United States agt. Keller* (13 *Federal Rep.*, 82), decided by the circuit court of the United States in Illinois in 1882, it appeared that Keller reached his majority on the 22d day of May, 1880, and was entitled to vote at the election for representative in congress held in November, 1880. He possessed the requisite qualifications prescribed by the laws of Illinois as to residence. He voted at that election and was afterwards indicted upon the claim that he was not a citizen of the United States, which was necessary to make him a voter. His parents were subjects of Prussia, the father dying there in 1865 without ever having been in this country. Afterwards his mother removed to the United States, bringing her infant son, the defendant, with her. In 1868 she married Michael Gaschka, a naturalized citizen. Keller's contention was that being an infant at the time of his mother's marriage to a citizen, that he became a citizen when she did. The question was carefully considered. Justice HARLAN of the supreme court writing the opinion, TREAT, the district judge, concurring, and it was determined that the mother's marriage to a citizen made her infant son such; that he was a legal voter, and his discharge was ordered. That case was precisely like the one now under consideration. It has been already shown that whether the naturalization of the husband was after or before the marriage, was immaterial. Newell's mother became a citizen while he was an infant, and the above case decides that he became such at the same time as his mother. He was therefore eligible to receive the appointment. The subject of naturalization and citizenship is within the exclusive jurisdiction of the United States. The states in their individual capacity have no concern with or power over those matters. It is a familiar rule that when the questions to be determined arise under the United States statutes, that the state courts are

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bound by and must follow the rulings of the federal courts on those questions (*Duncombe* agt. *N. Y. H. & N. R. R. Co.*, 84 *N. Y.*, 190). So, too, the construction placed upon the statutes of another state by the courts of that state, are controlling in the courts of this state (*Leonard* agt. *Columbia Steam Navigation Co.*, 84 *N. Y.*, 48). The questions are therefore settled in favor of the defendant by authority. But in the absence of adjudications, and as an original question, it is difficult to see how a different result could be reached.

Section 2172, above quoted, provides for children becoming citizens "at the time of the *naturalization of their parents*." The word "parents" technically includes both father and mother, but it has always been assumed without controversy that the naturalization of the father made his minor child a citizen, and it was so adjudged in the early case of *Campbell* agt. *Gordon* (*supra*). If he is dead and the mother is the only remaining parent, no reason is perceived why the mother's becoming a citizen should not have the same effect on the child as the father's becoming one. The intent of the statute and the end to be attained, must always be taken into consideration in construing it (*Mead* agt. *Stratton*, 87 *N. Y.*, 493; *Schlegel* agt. *The American Beer Co.*, 12 *Abb. N. C.*, 280; *Dinkel* agt. *Hathaway*, 11 *Hun*, 570; *People ex rel. Supervisors of Richmond* agt. *Hopkins*, 2 *Sup. Ct. [T. & C.]*, 586). It is very clear that any other construction might work great mischief. The father is dead; the mother becomes a citizen; she may be the owner of property; her children may desire to visit foreign countries while still infants, and if her becoming a citizen does not inure to their benefit and work in their favor the same result, they would be entirely without remedy or protection until they attained their majority, for the law makes no provision for making them citizens except through their parents, until they are of full age. It might follow that if the mother died her children would fail to inherit her real estate. It might escheat or pass into the hands of strangers (*Hall* agt. *Hall*, 81 *N. Y.*, 130). So, too, if they temporarily visit a

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foreign country they would be deprived of the protection and consideration involved in being American citizens. Congress could never have intended to pass an act which could be so construed as to work such results. It is not necessary to determine whether the naturalization of the husband is also the naturalization of the wife upon the common-law theory that they are but one person; or whether she becomes a citizen by virtue of the statute. For no importance can be attached to the mode in which she becomes a citizen. It is enough that a certain event which has happened makes her one. In *Leonard agt. Grant (supra)*, it was decided, among other things, that a woman who is married to a citizen of the United States becomes such by that act, and that such admission to citizenship has the same force and effect "*as if such woman had been naturalized by the judgment of a competent court.*" The learned counsel for the plaintiff in their brief suggest that "naturalization is a matter of record; a judgment of a court upon evidence." This is so where the statute has so declared, but in the case of infants and women the statutes declare that they may become citizens under certain circumstances, without any judgment or record. There are also numerous other cases where no record is required. When Louisiana, Florida and Texas were admitted into the union, the citizens of those states or territories were made citizens of the United States without the judgment of any court and without the action of any of their citizens. So, too, the civil rights bill made citizens of all negroes born in this country who had been slaves (*United States agt. Rhodes*, 1 Abb. U. S. R., 28).

The same is true of the treaty of peace of 1783 between Great Britain and the United States. In *Shanks agt. Pont* (3 Peters, 247), the supreme court of the United States speak on this subject as follows: "During the war each party claimed the allegiance of the natives of the colonies as due exclusively to itself. The Americans insisted upon the allegiance of all born within the states respectively, and Great Britain asserted

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an equally exclusive claim. The treaty of 1783 acted upon the state of things as it existed at that period. It took the actual state of things as its basis. All those whether natives *or otherwise* who *then* adhered to the American States were virtually absolved from their allegiance to the British crown, and those who then adhered to the British crown were deemed and held subjects of that crown. The treaty of peace was a treaty operating between the states on each side, and the inhabitants thereof; in the language of the seventh article it was a 'firm and perpetual peace between his Britannic majesty and the said states, *and between the subjects of one and the citizens of the other.*' Who then were *subjects or citizens* was to be decided by the state of facts. If they were originally subjects of Great Britain and then adhered to her and were claimed by her as subjects, the treaty deemed them such. If they were originally British subjects but then adhering to the states, the treaty deemed them citizens." It thus appears that citizens may be created by acts of congress, treaties and the judgments of courts. There can be no room for doubt as to the proper disposition of this case. The complaint must be dismissed and judgment ordered for the defendant.

SURROGATE'S COURT.

In the estate of JOSHUA YORK, deceased.

Surrogates — Their jurisdiction to determine who are legatees, and to what sums they are entitled — Code of Civil Procedure, section 2743.

The surrogate has jurisdiction, upon entering a decree for the judicial settlement of an executor's account, to determine who are testator's legatees, and to what sums they are respectively entitled and in spite of the limitations of section 2743 of the Code of Civil Procedure, he may exercise such jurisdiction in respect to legacies whose validity is disputed by the executor, and even in cases where such determination necessarily involves the construction of the testator's will.

New York County, November, 1884.

In the Estate of Joshua York, deceased.

ROLLINS, J. — This testator, by one of the clauses in the second article of his will, gives \$500 "to the trustees of the Second Avenue M. E. Church, corner of One Hundred and Nineteenth street, towards paying off the debt of the church." By the same clause, also, he gives "to the managers or trustees of the Methodist City Mission five hundred dollars." His executor having filed an account of his administration, now seeks to enter a decree for its judicial settlement; but he attacks the validity of both the above named legacies, and suggests that the surrogate, for lack of jurisdiction to determine the questions thus raised, should direct the accounting party to retain in his hands a sum sufficient to meet any demands growing out of these bequests, that may be successfully prosecuted in a competent tribunal.

He claims that the bequest first named is ineffective by reason of the fact that the church in One Hundred and Nineteenth street is not now in debt, and was not in debt when the testator died. He claims also that there is no existing person or institution bearing the name of "Methodist City Mission," and none which is competent to take the bequest whereof the will makes the Methodist City Mission the beneficiary.

It is insisted in behalf of the parties respectively claiming as legatees that the surrogate is fully authorized by the Code of Civil Procedure to determine these disputed questions.

Section 2743 of that Code provides that "where an account is judicially settled as prescribed in this article, and any part of the estate remains and is ready to be distributed to the creditors, legatees, next of kin, husband or wife of the decedent, or their assigns, the decree must direct the payment and distribution thereof to the persons so entitled, according to their respective rights.

The section further declares that "where the validity of a debt, claim or distributive share is not disputed or has been established, the decree must determine to whom it is payable,

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the sum to be paid by reason thereof and all other questions concerning the same."

In the case of *Fraenznick* agt. *Miller* (1 *Demarest*, 136-151) I contrasted the section just quoted from the Code with the statutory provision which it had superseded, namely, section 71, title 3, chapter 6, part 2 of the Revised Statutes (3 *Banks*, 6th ed., 104). I referred to the fact that while by the earlier provision the right of determining *all* questions concerning *any* debt, claim, legacy, bequest or distributive share had been conferred upon the surrogate, the authority of that officer to make such determination is limited by the later statute to "debts, claims or distributive shares *whose validity is not disputed or has been established*."

Because of this fact and because of the fact that Mr. Commissioner Throop had declared in his edition of the Code by a note to the very section under consideration, that it was the purpose of the codifiers to bring the letter of the new enactment into unmistakable conformity with the construction that the courts had put upon the old, I felt bound to hold in *Fraenznick* agt. *Miller*, that whenever an executor or administrator should dispute the validity of a demand against his decedent's estate, whether such demand should be made in behalf of one claiming as creditor, or as legatee, or in any other capacity whatsoever, the authority of the surrogate in the premises would be straightway suspended, and would remain suspended until the validity of such demand should have been passed upon by some tribunal of competent jurisdiction, and by some other tribunal, of course, than the court or the surrogate.

While this interpretation was in my judgment unavoidable, I adopted it with no little reluctance, and am glad to find what seems to me abundant warrant for abandoning it, in certain recent decisions of the court of appeals.

In "*Matter of Verplanck Estate*" (91 *N. Y.*, 439), where questions similar to those here presented were under consideration, EARL, J., pronouncing the unanimous opinion of that

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court, declared that surrogates "must have jurisdiction to construe wills so far at least as is needful to determine to whom legacies shall be paid." Referring to the then recent decision in *Riggs* agt. *Cragg* (89 *N. Y.*, 479), he added: "We were unanimously of the opinion that they possessed such a power under the Revised Statutes before the Code of Civil Procedure, *and it was clearly not the intention of the Code to narrow or diminish the jurisdiction of surrogates but rather to enlarge it.*" By the words italicised, taken in connection with their context, I understand that the propositions declared in *Riggs* agt. *Cragg*, respecting the jurisdiction of surrogates upon final accountings, though those propositions in terms relate only to cases arising under the Revised Statutes, are pronounced to be equally applicable to cases arising under the Code.

In *Riggs* agt. *Cragg* a person claiming as legatee sought to enforce from his testator's executors the payment of a disputed legacy. There were divers persons interested in the estate whose rights would be affected by the enforcement of a decree in the petitioner's favor. None of these persons were cited or had appeared as parties to the proceeding. Commenting upon this fact, ANDREWS, J., pronouncing the opinion of the court, said: "When the surrogate can see that other persons claim, or may claim the same thing as the petitioner, and that a real question is presented as to the right of several persons to the legacy or fund, natural justice requires that he should not proceed to a determination without the presence of all the parties who may be affected by the adjudication. The statute provides for bringing in all the parties in interest on the final accounting, *and in that proceeding jurisdiction is conferred to settle and adjust conflicting rights and interests.*"

The learned justice subsequently referred to the oft cited decision in *Bevan* agt. *Cooper* (72 *N. Y.*, 317), and after suggesting that, upon the reported facts of that case, there seemed to have been no necessity, *as incident to the accounting or distribution*, for the surrogate to assume the power of interpreting the testator's will, added: "It is doubtless true

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that a surrogate has no general jurisdiction in the construction of wills, but where the right to a legacy depends upon a question of construction, it must be determined before a decree for distribution can be made. *The surrogate has, we think, jurisdiction * * * upon a final accounting, where all parties interested are before the court, to determine such construction as incident to the authority to make distribution.*"

In "*Matter of Verplanck*" (*supra*), the court of appeals recently upheld a surrogate's authority to determine, upon an executor's accounting, whether a provision in a testator's will should be deemed invalid as involving a suspension of the power of alienation, and whether by another provision directing distribution of a portion of his estate, the testator intended a distribution *per stirpes* or one *per capita*.

The opinion of RUGER, C. J., in *Flester* agt. *Shepard* (92 N. Y., 251), contains certain intimations that are not, perhaps, in thorough harmony with the doctrine of the two cases last cited, but that doctrine has been still more recently reasserted by the court of last resort, ANDREWS, J., pronouncing its opinion in *Purdy* agt. *Hoyt* (92 N. Y., 446).

Upon the authority of these decisions, I must deny the motion of counsel for the executor, and, in the decree about to be entered, must settle and determine the rights of all who claim as legatees under the will. A reference will be ordered for that purpose.

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N. Y. COMMON PLEAS.

PETER BOWE, sheriff, agt. CHARLES W. WILKINS and others.

Sheriff — Attachment — Bond of indemnity — Duty of sheriff when bond of indemnity is given — When demand not necessary before bringing action against sheriff — When sheriff's acts are ratified by attaching creditors — Code of Civil Procedure, section 709.

Where a sheriff makes a levy, and then receives a bond of indemnity, he is bound to hold the property until it is adjudged that it does not belong to the defendant, unless the party giving the bond instructs him to release the levy.

Where an attachment is set aside for irregularity, and there is no adjudication as to the ownership of the property levied on, the sheriff ought not to surrender it to a person whose claim the bond of indemnity makes it his duty to contest. Section 709 of the Code of Civil Procedure does not apply to such a case.

A demand is not necessary before bringing an action where the sheriff levies upon the goods of a party not named in the process.

Even if it had been the duty of the sheriff to surrender the goods on the setting aside of the attachment, notwithstanding he had received a bond of indemnity, his retention of the goods was ratified by the attaching creditors inasmuch as they subsequently appealed from the order vacating the attachment, and thereby manifested an intention to hold the goods, if possible; and they ratified the sale of the goods under an execution, issued at their instance in the attachment suit, by accepting the proceeds of the execution sale.

Trial Term, July, 1884.

ABOUT December 10, 1880, Talbot, Wilmarth & Co. obtained a warrant of attachment against the property of Harriet S. Briggs, under which the plaintiff, then sheriff of the city and county of New York, December 11, 1880, attached the stock fixtures, &c., in the store No. 140 Fulton street, New York city, where Mrs. Briggs had been carrying on business as tailor. The same day the attached property was claimed by George W. Galinger, as her assignee, for the benefit of creditors. Against this claim Talbot, Wilmarth & Co. gave the indemnity bond to the sheriff, upon which the present action is founded.

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Mrs. Briggs moved to vacate the attachment for irregularity, and by an order dated December 20, 1880, the motion was granted. This order, after signature but before entry, was exhibited by the assignee to the sheriff, but no copy appears to have been served. From this order the creditors appealed; upon the appeal the general term, by order dated January —, 1881, affirmed it.

On December 24, 1880, the assignee commenced an action against the sheriff for the trespass in entering the store No. 140 Fulton street, December 11, 1880, and wrongfully taking possession of the attached property and converting the same to his own use. He also alleged demand of the property and refusal to return the same. This action was defended by the sheriff, the creditors' attorneys giving directions and taking part in its conduct and trial. Upon the trial the assignee testified to the trespass and a demand December 11, 1880, and also to a demand after the vacation of the attachment. The court there ruled that the sheriff could not prove the fraudulent character of the assignee's title, and also that if a demand were made after vacation of the attachment, nothing remained for the jury except to assess damages. The jury found for the assignee, and judgment was entered thereon against the sheriff. The present action is brought against the indemnitors to recover the amount of that judgment, and the expenses incurred in its defense.

Pending that action Talbot, Wilmarth & Co. recovered judgment in the attachment suit against Mrs. Briggs, and the property in question was sold under execution thereon, and the proceeds paid to their attorneys, who had full knowledge of the source whence it came. Upon the present trial the evidence was conflicting as to whether the assignee made any demand upon the sheriff; but it appeared that the creditors' attorneys had tendered the property back to him, and he had refused it, and also that he had stated to the sheriff's officer in charge of the writ that he would not receive it except upon certain conditions to be complied with by the creditors.

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The defendants here claimed that the omission of the sheriff to deliver the property to the assignee at once, upon the vacation of the attachment, released them from liability; and also that the alleged demand and refusal at that time were the foundation of the action against the sheriff, and that recovery was had against him solely upon that ground.

Henry E. Knox and Malcolm Graham, for plaintiff.

Alexander Blumensteil and M. J. Hirsch, for defendants.

VAN HONSEN, J. — The plaintiff in his capacity of sheriff levied an attachment against Harriet S. Briggs upon certain property claimed by George W. Galinger. Upon the assertion by Galinger of his claim the sheriff demanded a bond of indemnity, which was given to him, the defendants in this action being the obligors who executed the bond. The sheriff, being so indemnified, refused to surrender the property to Galinger. Mrs. Briggs then moved to vacate the attachment. The motion made to set aside the attachment was granted, and an appeal was taken from the order by which the attachment was vacated. Before that appeal came on for argument Galinger swears that he again demanded the property of the sheriff, and that the sheriff again refused to surrender it. Whether he did so or not Galinger brought his action for the value of the property, and the sheriff at once gave notice to the obligors of the bond of the fact that Galinger had brought suit against him. The obligors from that time forward participated in the defense of the action against the sheriff, and the attorneys for the plaintiff who sued out the attachment were present at the trial and took part in it. After Galinger had brought his action the appeal from the order that vacated the attachment was argued, but the order was affirmed.

When the action against the sheriff was tried the court excluded the defense set up by the defendant because the order that vacated the assignment deprived the sheriff of his justification for holding the property. The attachment having

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fallen, the sheriff could not avail himself of it as a muniment of title. The action brought by Galinger was trespass, not trover, and the question of demand did not arise in the case. Galinger alleges in his complaint that the sheriff wrongfully entered his store, and wrongfully took possession of the property sued for, and under those allegations could recover damages for the invasion of his land as well as for the asportation of his goods. It is true that the judge at the trial seemed to suppose that the issues were the same as if the action was between the sheriff and Mrs. Briggs, the defendant in the attachment; for he dwells upon the demand, though a demand could not be requisite if the goods that were seized under the attachment belonged to a person not named in the warrant. Galinger's cause of action was complete when the sheriff took his goods under an attachment against Mrs. Briggs, and no demand was necessary. The ruling of the judge was correct, however, though the reason he gave for it was inappropriate. When it appeared that the attachment, which was the sheriff's only warrant for the levy, had been set aside, his right to attack the title of Galinger no longer existed, and, therefore, the only duty that remained for the judge and the jury was to assess Galinger's damages for the wrongful taking that he complained of. The criticism I have made upon some observations of the trial judge does not prevent me from giving full faith and credit, and full force and effect, to the verdict and to the judgment that was entered thereon.

The *status* of the parties to this litigation was not, in reality, at all affected by the question as to whether or not Galinger made a second demand upon the sheriff after the vacation of the attachment.

It is true that if the property had been surrendered by the sheriff, and accepted by Mr. Galinger, the action against the sheriff would not in all probability have been brought, but that would have been because Galinger did not see fit to prosecute his demand for damages for the original wrongful

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taking. If Galinger had seen fit to bring his action notwithstanding the return to him of the property that had been levied on, the sheriff would doubtless have looked to the indemnity bond for reimbursement. But it is argued by the defendant that as Galinger swore at the trial of his action against the sheriff that after the vacation of the attachment he demanded the return of the goods, and that the sheriff refused to surrender them, and as the sheriff did not at that trial offer testimony to contradict Galinger, the sheriff has lost the right to claim indemnity. The argument is that section 709 of the Code provides that "where an attachment is vacated or annulled, or an attachment is discharged upon the application of the defendant, the sheriff shall deliver the attached property to the defendant or to the person entitled thereto, upon reasonable demand or upon payment of all costs, charges and expenses legally chargeable by the sheriff," and that this provision imposes a duty upon the sheriff that he must perform without respect to the interests of the plaintiff in the attachment, and without respect to his having been given a bond of indemnity. "When the attachment is vacated," says the counsel for the defendants, "it is the duty of the sheriff to surrender the property upon demand made, and he is doing a wrongful act not within the contemplation of the parties at the time the indemnity bond was executed if he persists in holding the goods." This is begging the whole question. When the indemnity bond was given the sheriff had seized certain goods as the property of Mrs. Briggs, and Galinger had claimed them, and had demanded them of the sheriff. Wilkins and his associates, the plaintiffs in the attachment, then determined to dispute Galinger's right to the goods, and to try the question of his title in the courts. Accordingly they gave to the sheriff the bond of indemnity, and required him to retain the goods in spite of Galinger's asserted title until it had been determined by the judgment of a court whether Galinger or Mrs. Briggs was the owner of the property at the time it was levied on. The indemnity bond

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has a very different meaning from that which counsel now seeks to ascribe to it. It was intended to impose upon the sheriff the obligation of keeping the property until the court should decide whether Mrs. Briggs or Galinger was the rightful owner, and the sheriff would have made himself liable to the plaintiffs in the attachment if (he) had given up the goods before the question of Mrs. Briggs' title to the goods had been passed upon by the court. It is true that the attachment was set aside as irregular (for the order shows that it was vacated upon the plaintiffs' own papers), but that did not determine whether or not Galinger or Mrs. Briggs was the owner of the property, nor did it establish that Galinger had the slightest claim to it. It might well be that the attachment was irregular, but an adjudication to that effect did not determine that Galinger was entitled to the property, and as the court had not so decided, the sheriff was not bound to assume the risk of deciding the question, or of delivering the property to him merely because he said he was the owner. The plaintiffs in the attachment said he was not the owner, and if the sheriff had undertaken to surrender the goods to Galinger he would have been answerable in damages to the plaintiffs who had given him their bond of indemnity, unless he could show affirmatively that Galinger did actually own the goods at the time of the levy. In other words, by surrendering the property the sheriff would have stepped into Galinger's shoes and become the antagonist of the plaintiffs instead of their bailiff. After the vacation of the attachment, a completed sale of the goods to Galinger could not be impeached by the attaching creditors as fraudulent in fact, but it still was in their power to establish a defense by showing that Galinger had neither title to nor possession of the property. Again, the plaintiffs in the attachment were not content with the special term order that set aside the attachment, and they appealed. Suppose that the general term had reversed the order of the special term and held the attachment papers to be sufficient, what would the position of

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the sheriff have been if he had given up the goods? Would not the plaintiffs in the attachment have said with overwhelming force, "this is a valid attachment, and you levied goods under it; we want them; if you say that you have given them up, you must answer to us for their value; if you say that Galinger owned them, we answer that that is the very question that we wish to try, and because we wished to try it, we gave you a bond of indemnity; having that bond, it was your duty to hold the goods until the court adjudged Galinger to be the owner, or until we told you to give the goods up. The court has not passed upon Galinger's title and we have never instructed you to yield to his demand."

If this would have been the relation of the parties towards each other, can there be a doubt that it would have been wrong for the sheriff to surrender the goods even if after vacating the attachment Galinger had made a second demand. That this was the view of the obligors of this indemnity bond is incontestable. After this action was brought they went on with their appeal from the order that set aside the attachment, hoping, doubtless, that the order would be reversed and the attachment reinstated, so that they might still hold the goods. Can it be pretended that the plaintiffs intended whilst prosecuting their appeal to the general term to concede that Galinger was entitled to the property? Was not the sole object of the appeal to secure and retain the goods that had been attached? If the appeal had been successful, would there have been any complaint of the alleged refusal of the sheriff to acknowledge Galinger as the owner of the property? Because their appeal failed, should they be allowed to repudiate the action of the sheriff? The course of the sheriff met their views exactly until the result of the appeal disappointed their hopes. The attempt to make the sheriff responsible for the result of the Galinger suit is most unfair, for the blame, if blame there be, should fall on those who committed the irregularity in suing out the attachment.

Again, the attorneys for the plaintiff in the attachment,

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with the full knowledge of the source from which the money was obtained, collected from the sheriff the proceeds of the goods that had been seized under the attachment. They paid this money to their clients. There is no question here as to the levy, nor any doubt that it was made with the sanction of the plaintiffs. The indemnity bond was given to protect the sheriff from loss by reason of his levy on these very goods in case Galinger established a title to them. The receipt of the proceeds of the sale by the plaintiff was under those circumstances a full ratification, if one were needed, of the acts of the sheriff in selling the goods under the execution.

The equities of the case are all with the sheriff. If Wilkins and Talbot had directed the sheriff to give up the goods after the attachment had been vacated by the special term, there would then have been a good defense to this action on the bond of indemnity. A refusal by the sheriff to surrender the property in such a case might well be said to be a wrong on his part for which he alone should be held liable; but on the facts that have been presented to me, I can discover no principle of law nor any rule of fair dealing that would justify the rejection of the sheriff's claim to indemnity.

Judgment for the plaintiff.

SUPREME COURT.

In the Matter of the Application of PAUL EMIL REMY MARTIN
to vacate the award of CHARLES CROSS, umpire, &c.

Statutory arbitration — Waiver of right to produce witnesses — Right of parties to appear and be heard before the umpire — When award a nullity and will be set aside as void.

Although a party may waive the right to be heard and to produce witnesses before arbitrators, such right will not be deemed to have been waived unless the waiver is clearly demonstrated.
Even if a party waives his right to appear before the two original arbitra-

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tors, he is still entitled to appear and be heard before the umpire, and an award by the latter where a party has had no opportunity to appear before him is void.

On a motion to vacate and set aside an award where it appeared that the umpire was not notified until the 28th of April, 1884, that he would be called upon to act. On the 29th of April, 1884, he accepted the position, and on the 30th of April, 1884, he made his award. The parties were not called before the umpire, nor were they heard before him and the arbitrators. He took the statements which had been laid before the arbitrators and verbally settled the differences between such arbitrators, and gave his decision as umpire and made his award, which award was subsequently acquiesced in and agreed to by the arbitrators:

Held, that the award should be vacated and set aside.

New York Chambers, October, 1884.

George H. Yeaman, for relators.

Rindskopf & Cardozo, for respondent.

LAWRENCE, J. — I am of the opinion that the submission in this case was a submission under the statute, and that the case must be disposed of on that assumption.

As the parties reduced their agreement to writing it seems to me that they must stand or fall by that agreement, and that it is not competent for me to consider the negotiations which may have taken place between the parties prior to the signing of the agreement. By the agreement it is provided that "it is hereby further mutually agreed that the judgment of the supreme court of the state of New York shall be rendered upon the award entered pursuant to this submission." At common-law judgment could not be entered upon an award, but the parties were left to an action to enforce the same. So, too, the acknowledgment of the submission is clear evidence to my mind that the parties intended to make a submission under the statute, and not otherwise.

The agreement of submission does not contain any provision for the appointment of an umpire in the case of a disagreement between the arbitrators; but inasmuch as the parties to the submission, on the same day on which the agreement of

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submission was executed, also signed an agreement in writing waiving the oath of the arbitrators, and the umpire selected by them, I think that the two papers should be read together, and that it must be held that the parties contemplated the appointment of an umpire in case the arbitrators were unable to agree.

Although a party may waive the right to be heard and to produce witnesses before arbitrators, such right will not be deemed to have been waived unless the waiver is clearly demonstrated (*See Day agt. Hammond*, 57 *N. Y.*, 479, and the cases cited by DWIGHT, *Commissioner*; see, also, *Brown agt. Lyddy*, 11 *Hun.*, 451).

In this case there is evidence on the part of Mr. Blum which tends to show a waiver by the parties of the right to call witnesses (see affidavits of Alfred Blum), or to be further heard after they had produced their written statements before the arbitrators. But there is no evidence which shows that either of the parties agreed that, in case the arbitrators disagreed and found it necessary to appoint an umpire, the parties should not be heard before such umpire and be allowed to produce evidence before him. I regard this fact as fatal to the award in this case. In the case of *Brown agt. Lyddy* (*supra*) it was held that, "even if a party waived his right to appear before the two original arbitrators, he was still entitled to appear and be heard before the umpire, and that an award by the latter, where a party had had no opportunity to appear before him was void." Now, in this case it appears that the umpire was not notified until the 28th of April, 1884, that he would be called upon to act as such umpire. On the 29th of April, 1884, he accepted the position, and on the 30th of April, 1884, he made his award. The parties were not called before the umpire, nor were they heard before him and the arbitrators. He took the statements which had been laid before the arbitrators, and to use his own language "having verbally settled the differences between you (that is the arbitrators), and given my decision as umpire, which of course is binding, &c.," he

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proceeded to give his reasons for the award which he made, which award was subsequently acquiesced in and agreed to by the arbitrators. In the case of *Day agt. Hammond* (57 N. Y. R., at page 485), DWIGHT, commissioner, quotes approvingly from Russell's work on arbitrators, wherein the learned author says: "The umpire, when called upon to act, is in general invested with the same powers as the arbitrators, and bound by the same rules, and has to perform the same duties. He must pursue the same regular course with respect to the conduct of the case as arbitrators. He must examine such witnesses as the parties choose to produce, and as to such points as they choose to raise, although the same witnesses have been examined as to the same points before the arbitrators. He may not take the evidence or any part of it from the notes of the arbitrators, unless there be a special provision in the submission or a clear agreement between the parties permitting such a course" See, also, *Elmendorf agt. Harris* (23 Wend., 628), wherein it was held that if an umpire decides without having appointed a time for hearing, or without giving notice of it to a losing party, the award is a nullity in a court of law (See, also, the cases cited in DWIGHT, commissioner's opinion, 57 N. Y. R., 486).

For the reasons above stated, I deem it unnecessary to consider the various other questions which were discussed by counsel, on the argument, and it follows therefore that the motion to vacate and set aside the award should be granted, with costs.

Marie *et al.* agt. Garrison.

N. Y. SUPERIOR COURT.

PETER MARIE *et al.* agt. CORNELIUS K. GARRISON,
interpleaded, &c.

*Referees — Trials by — When referees will not be removed on the grounds of
bias and incapacity.*

The Code of Procedure has prescribed the method of trial before a referee, and has provided that, except in certain excepted cases, the whole or any of the issues in an action must be referred upon the consent of the parties; and where the stipulation names the referee, the clerk must enter an order of course, referring the issue or issues for trial to that person only.

The referee is there given substantially the same power as is given to a judge on the trial by the court without a jury, and provision is made for an appeal from judgment upon a trial by a referee, in the same manner as upon the trial by the court without a jury.

As the court in such case has no voice in determining whether the case should be referred, or in selecting the person who should preside at the trial, it would not be justified in vacating the order entered on such stipulation, except upon proof of some act of the referee tending to show that some means or influence other than the evidence and argument adduced before him have or will influence his decision.

Where on a motion to remove a referee on the grounds of bias and incapacity, the party moving, to support their allegations, set forth in their affidavits a great number of the rulings of the referee on the trial of the action before him, and claimed that such rulings entitled such party to the relief demanded:

Held, that as the rulings referred to are decisions of the questions which the parties had consented should be determined by the referee named and selected by them to decide (the legislature having provided a method of review), if he has committed an error in his decisions, the defeated party should be left to his remedy by appeal.

Special Term, December, 1884.

MOTION by defendants to remove referee.

Henry L. Clinton, for motion.

Mason W. Tyler and *Roscoe Conkling*, opposed.

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INGRAHAM. *J.* — On the consent of all the parties, an order was entered "that this action be referred to Hon. Theodore W. Dwight of the city of New York to hear and determine all the issues in the action." Under this order the action was brought on for trial before the referee, the case for the plaintiff closed and, after the denial of a motion for a dismissal of the complaint, defendants proceeded with their defense.

Before the close of the defense defendants made this motion to remove the referee and vacate the order of reference, on the ground that the referee is so biased and prejudiced in favor of the plaintiffs and against the defendant Garrison, that he is not impartial, and cannot be impartial between the parties to the action, and that said referee is not capable of applying the well settled and indisputable principles of law or the ordinary rules of evidence to the facts proved before him.

The defendants, to support the allegations of bias and incapacity, set forth in their affidavits a great number of the rulings of the referee on the trial of the action before him, and claim that such rulings entitle defendant to the relief demanded. There is no allegation of any action of the referee showing any bias, prejudice or feeling on his part against defendant or in favor of plaintiff, except such as defendants claim can be gathered from the rulings and decisions referred to. All of the rulings complained of were made by the referee on questions arising on the trial of the action, and were among the questions referred to him by the order of reference.

The Code of Procedure has prescribed the method of trial before a referee, and has provided that, except in certain excepted cases, of which this is not one, the whole or any of the issues in an action must be referred upon the consent of the parties; and where the stipulation names the referee, the clerk must enter an order of course, referring the issue or issues for trial to that person only.

The referee is then given substantially the same power as is given to a judge on the trial by the court without a jury, and provision is made for an appeal from judgment upon a trial

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by a referee, in the same manner as upon the trial by the court without a jury.

It will be seen that these provisions have established a tribunal to a great extent independent of the court in which the action is pending, and founded on the consent of the parties to the litigation. It is a tribunal of their own choosing. The court has no voice in determining whether the case should be referred or in selecting the person to preside at the trial. If the court would not have had the power to choose the referee, where the stipulation of the parties named the person to whom the action shall be referred, it certainly would not be justified in vacating the order entered on such a stipulation, except upon proof of some act of the referee tending to show that some means or influence other than the evidence and argument adduced before him, have or will influence his decision.

That the court should "guard with jealous watchfulness the rights of litigants to the unbiased judgments of a jury or referee" should never be lost sight of. And any act of a referee which would give even the appearance of evil should be promptly rebuked. But nothing of that kind is claimed in this case.

As to the rulings referred to, as before stated, they are decisions of the questions which the parties have consented should be determined by the referee named. They selected him to decide such questions. The legislature has provided a method of review if he has committed an error in his decisions, and I am of the opinion that the defeated party should be left to his remedy by appeal.

I have carefully abstained from intimating an opinion as to the correctness of the rulings complained of, presented as they are on this motion. Without the whole evidence before me it would be impossible to form an intelligent opinion on the subject. It is only necessary to say that no misconduct of the referee has been shown, and I think I would not be justified in granting this motion.

The motion must therefore be denied, with costs.

The People agt. Harrington.

COURT OF SESSIONS.

THE PEOPLE agt. JOHN HARRINGTON and GEORGE MESSER.

Power of court to suspend sentence after conviction — When court cannot afterwards sentence upon such conviction — Code of Civil Procedure, section 832 — Penal Code, sections 507, 711.

The court of sessions has the power to suspend sentence after conviction and may at any time afterwards pronounce sentence upon same conviction.

But if the rights or *status* of the prisoner change, as where when he is convicted he is under sixteen years of age and may be sentenced to the House of Refuge, which would not disfranchise him, after he passes that age he cannot be sentenced upon such conviction.

Albany, November Term, 1884.

JOHN C. NOTT, *County Judge*, and ALBERT E. HINMAN and PETER WALKER, *Associates*.

THE facts are sufficiently stated in the opinion.

D. Cady Herrick, district attorney, for the people.

Galen R. Hitt, for prisoners.

NOTT, *County Judge*. — At the June term of the court in 1883, the defendants Harrington and Messer were indicted for the crime of burglary in the second degree, and upon their arraignment each entered a plea of guilty. After their pleas this court, county judge VAN ALSTYNE presiding, suspended sentence, and each was discharged from custody. In November, 1884, the defendants were committed to jail by one of the police justices of this city, charged with another crime. The district attorney on December 5, 1884, caused the defendants to be brought into this court, and moved that each be sentenced under his plea of guilty entered at the June, 1883, term of this court.

The defendants through their counsel, G. R. Hitt, object

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thereto, urging various grounds. At the time the plea was entered both defendants were under sixteen years of age. Harrington is still under sixteen, but Messer is now over that age.

In the case of the *People agt. Morrisette* (20 *How. Pr.*, 118) the court of oyer and terminer refused to suspend sentence, holding that no suspension of sentence or stay is authorized except upon a *certiorari* or writ of error, on application in arrest of judgment, or for a new trial, but this ruling is contrary to the current of cases in this country, and the precise point has been recently determined in the fourth department of the supreme court. In the *People agt. Graves*, says HARDIN, J., "we regard the essential question in this case so firmly resolved against the appellant by the authorities that we do not deem it useful to open the question for fresh investigation and adjudication" (2 *N. Y. Crim. R.*, 227). It is just and proper that the power to suspend sentence should exist in the superior criminal courts. Great harm might otherwise flow to society in the destruction of the means of those charged with the administration of criminal justice to expose through this aid dangerous conspiracies against person and property. "It would seem," says DIXON, J., "that it is stating the matter too broadly to assert that it is always the imperative duty of a court to render judgment on a conviction of crime, unless some legal proceedings for review be interposed, considerations of public policy may induce the court to stay its hand" (*State agt. Adly*, 14 *Vroom*, 113; 39 *Am. R.*, 546). In the case of Harrington the clemency of this court seems to have had no salutary effect upon him. We find him again in the custody of the law charged with crime, and our duty is to impose sentence on him, which is that he be confined in the House of Refuge during the pleasure of the managers (*Park agt. People*, 1 *Lans.*, 263). In Messer's case a different question is presented. In his case at the time of his plea of guilty, he was one of that class of criminals recognized as juvenile delinquents, and the sentence of the court might and probably

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would have been to the House of Refuge, where his mind would have been properly trained and means taken to reform and educate him, and although but for the provisions of the Code of Civil Procedure (*sec.* 832) he would be disqualified as a witness (*People agt. Park*, 41 *N. Y.*, 21), yet his right to vote at any election, when arriving of age, would not be taken away (*Penal Code*, *sec.* 711). He is now over the age of sixteen years, and if sentenced he must be imprisoned "in a state prison for not more than ten years, nor less than five years" (*Penal Code*, *sec.* 507), or to the Elmira Reformatory, wherefrom he may be transferred to a state prison.

A sentence now under the plea of guilty would be adding an additional penalty to that which might and probably would have been suffered if sentenced at the time he entered his plea, that of disfranchisement. It is an elementary rule that any law that changes the punishment and inflicts a greater punishment than the law annexed to the crime when committed is void (*Valder agt. Bull*, 3 *Dall.*, 386-390), and the rule is the same when the law is changed after convictions (*Hartung agt. People*, 22 *N. Y.*, 95). The humanity of our law, and the genius of our constitution requires that no severer penalty should be imposed on a criminal than that which existed when the offense was committed or a conviction had. In *State agt. Addy* (43 *N. J. L. R.*, 113), it was held on a conviction of maintaining a nuisance, the court having suspended sentence on payment of costs, so long as the defendant should abate the nuisance, that a sentence of imprisonment at a subsequent time was void.

The charity of a court should not be allowed to work an injustice to a defendant. Independent of the question of disfranchisement, there is such a marked difference between the methods and prison discipline of the House of Refuge and a state prison, that it is apparent a sentence now of Messer to a state prison would be harder and more severe than if sentenced over a year ago when the plea was entered! Entertaining these views the court declines to sentence Messer

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on his plea of guilty, and remands him into the custody of the sheriff under the later criminal charge, upon which he was committed to jail to be proceeded against as the law directs.

N. Y. SUPERIOR COURT.

STEPHEN R. KROM, plaintiff, agt. ASHER KURSHEEDT, defendant
and respondent.

Non-resident clients — When defendant may require security for costs — When attorney liable for such costs — Residence — What constitutes — Code of Civil Procedure, sections 8268-8278.

Mere presence in the state during business hours does not constitute residence, so as to relieve an attorney from his liability for costs, under section 8278 of the Code of Civil Procedure.

It is no answer under this section that the attorney commenced the action in good faith and in the belief that the plaintiff and his family were domiciled in New York.

Nor does the omission of the defendant to demand security for costs during the pendency of the action affect the attorney's liability.

General Term, December, 1884.

Before SEDGWICK, C. J., VAN VORST and FREEDMAN, JJ.

A. B. Moore, for appellant.

M. A. Kursheedt, for respondent.

FREEDMAN, J.— This is an appeal by George F. Wellman, the attorney for the plaintiff, from an order requiring him as such attorney to pay to the defendant the sum of \$100 on account of the costs awarded to the defendant in the action. At the time of the commencement of the action the plaintiff resided with his family at Plainfield, New Jersey, and he still continues to reside there.

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By section 3268 of the Code of Civil Procedure, the defendant may require security for costs to be given where the plaintiff was when the action was commenced, a person residing without the state; and by section 3278 the plaintiff's attorney in such a case is made liable for the defendant's costs to an amount not exceeding \$100, until security is given as prescribed, although the defendant has not required such security to be given.

It is claimed, however, by the appellant that because it was made to appear by affidavit that at the time of the commencement of the action, the plaintiff had been engaged in business in the city of New York for about sixteen years, he was not a non-resident within the meaning of section 3628, though he and his family were domiciled in another state.

After a careful examination of the cases cited to illustrate the distinction between residence and domicile, and conceding that a person can have a residence in one state and his domicile in another, I fail to see how the appellant can be relieved. Mere presence in the state during business hours has never yet been held to constitute residence. On the contrary, in the enforcement of our attachment laws against non-residents, it has repeatedly been held that presence during business hours in this state does not amount to residence (*Wallace & Sons* agt. *Castle*, 68 *N. Y.*, 370; *Chaine* agt. *Wilson*, 1 *Bosw.*, 673; *Barry* agt. *Bookover*, 6 *Abb.*, 374).

In the absence, therefore, of a statutory provision making presence during business hours in this state equivalent to residence, in the construction of section 3278, the order appealed from was fully warranted by the facts shown to the court below.

It is no answer, under section 3278, that the appellant commenced the action in good faith and in the belief that the plaintiff and his family were domiciled in New York. Nor does the omission of the defendant to demand security for costs during the pendency of the action affect the attorney's liability (*In the matter of David Levy*, 10 *Daly*, 391).

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There being no merit in any of the points raised by the appellant, the order appealed from should be affirmed, with costs, &c.

SEDGWICK and VAN VORST, JJ., concurred.

SUPREME COURT.

VALENTINE S. CROPSY, respondent, agt. PHILETUS R. PERRY,
appellant.

Replevin — Highway act, Laws of 1867, chapter 814 — Evidence — The extent to which a cross-examining counsel may go into matters which are not involved in the suit, and which are wholly immaterial, for the purpose of impeaching a party or witness — When action of replevin cannot be maintained to recover animals seized under the highway act — What may be shown as a bar to such action.

Where a person has seized animals under the highway act (*Laws of 1867, chap. 814*), and instituted proceedings under the statute before a justice, the owner cannot maintain an action of replevin to recover their possession, and if he does, the defendant may show what was litigated before the justice to establish his right to seize and hold the animals as a bar to the action to recover the possession of them.

A cross-examining counsel should not be allowed to go into matters not involved in the suit and which are wholly immaterial in the case for the purpose of impeaching a party or witness. In order to impeach a witness out of his own mouth the questions must be confined to material matters in the case about which the witness has testified.

See line of questions put in this case which the court condemns.

Fourth Department, General Term, January, 1884.

Before SMITH, P. J., HARDIN and BARKER, JJ.

AN appeal from a judgment, entered upon a verdict in the plaintiff's favor, in an action of replevin for a span of horses.

J. D. Decker, for appellant.

Delbert A. Adams, for respondent.

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BARKER, J.—At the time of the commencement of the action, the plaintiff was the owner of the property, and the same was in the actual possession of the defendant. The defendant sought to justify the detention of the property, after the plaintiff made proper demand upon him for a return of the same, upon the ground that the horses broke into his inclosures from the highway, and while they were doing damage to growing crops, he seized and took them into his custody, in pursuance of the provisions of chapter 814 of the Laws of 1867. The seizure was made on the morning of Saturday, and this action was commenced on Monday following, and during the intermediate time the property remained in the possession of the defendant.

On the trial the plaintiff gave evidence tending to show that the animals broke into the defendant's fields directly from his own pasture lot, and not from the highway. The defendant's evidence tended to show that the horses broke into his inclosures directly from the highway where they were running at large and unattended. The jury were instructed if the horses were running at large in the highway, and broke into the defendant's inclosures therefrom, then the defendant was entitled to a verdict, and the plaintiff could not recover as the defendant's detention of the animals was justifiable under the provisions of the statute, that if they broke into the defendant's fields, from the adjacent pasture lands, then the plaintiff was entitled to recover, as the statute afforded the defendant no protection in such a case, for a seizure and detention of the horses.

It was held in *Hubbell agt. Meigs* (50 N. Y., 480), that the act has no application to trespassers through division fences between neighbors, but only those committed from the road. The rule of law laid down by the trial judge was in strict compliance with the statute as interpreted by this decision.

The defendant insists, however, that upon the trial, he presented conclusive evidence that the horses came into his inclosures from the highway. In support of this position, he

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proved that on the same day the horses were seized by the defendant, and immediately thereafter, he made complaint in writing, under oath, to William Leach, a justice of the peace, in the town in which such seizure was made, and that thereupon the magistrate issued a summons returnable on the 7th day of July, 1877, and the same was returned as served in the manner required by the terms of the act. It appears that this process was served upon the plaintiff in this action as owner, and that he appeared upon the return day, and made an answer in writing, duly verified by himself, and the proceedings were adjourned until the seventeenth day of July, when a jury was summoned, the defendant appearing as complainant, and the plaintiff as owner, and witnesses sworn, on the call of the respective parties.

The justice's docket was produced and read in evidence, and it contains an entry as follows:

"Jury delivered their verdict in open court, whereby they find a verdict for plaintiff, of six dollars and twenty-five cents, whereupon I did immediately render judgment upon such verdict for damages in favor of plaintiff and against defendant, for six dollars and twenty-five cents and costs of suit, and the sale of the said property made in pursuance of statute.

\$6.25

"WILLIAM LEACH,

\$5.00 costs.

Justice of the Peace."

If on inspection of the whole record, it is made to appear that it was litigated in these proceedings, and determined as a matter of fact, that the horses entered upon the defendant's premises from the highway, then, as between these parties, it is conclusive evidence upon the same issues in this action, and establishes the fact in the defendant's favor, and it was the duty of the court to direct a verdict in the defendant's favor, as requested on the trial.

It is a well settled and general rule, that the judgment of a court of concurrent jurisdiction directly on the point, is, as a plea, a bar; or as evidence conclusive, between the same parties, upon the same matter directly in question in another

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court; or, in other words, that the decision of a court of competent jurisdiction, directly upon the same point, is conclusive when the same point comes up again in controversy between the same parties, directly or collaterally, and it makes no difference whether the first adjudication is a proceeding according to the common-law, or summary in its character (1 *Greenleaf on Evidence*, sec. 526-528; *White* agt. *Coatsworth*, 2 *Seld.*, 137).

This proposition is not contended against by the plaintiff, but it is argued by him that it does not *now* appear that in the proceedings before the justice, the question was up and determined as a fact, that the horses did enter the defendant's inclosure from the highway, I concur in taking this view of the record, as I am unable to discover that that question was litigated in those proceedings, or necessarily determined by the verdict.

In the complaint made by the defendant, upon which the proceedings were initiated before the justice, it does not state that the horses which were found trespassing upon his premises, entered thereon from the highway. The whole of that document is in these words: "I hereby make complaint to you that I have seized and taken into my custody (description of horses * * *) found trespassing upon the premises owned and occupied by me, in said town, contrary to the provisions of chapter 814 of the Laws of the state of New York, passed May 9th, 1867; and "I hereby request you to issue a summons as required by the provisions of the said act." The summons issued by the magistrate is substantially in the language of the complaint, and it does not state, that the horses entered from the highway. The defendant on the return of the summons, filed a written answer denying the complaint, and setting up that if the horses did enter upon the complainant's premises, it was through and over a division fence, which it was the duty of the complainant to keep in repair.

The complainant as well as the owner having both appeared

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before the magistrate's court, it was competent to litigate and determine the fact, essential to the maintaining of the proceedings, that the horses did enter from the highway. But the record does not prove that the fact was litigated, or any evidence given upon that subject. The form of the verdict as rendered by the jury, and the judgment entered thereon, indicates that other questions than that were in issue, and the verdict of the jury was based upon a determination of the same in the defendant's favor. The proceedings contemplated by the statute are *in rem* and not *in personam*, and do not under any circumstances provide for rendering a personal judgment, against the owner, for the damages which the complainant may have sustained by reason of the trespass (*Campbell agt. Evans*, 45 N. Y., 356).

This is the statute: "If, on the return of the process, the jury shall find that no sufficient cause is shown why a sale should not be made, then the justice shall issue his warrant directed to a constable commanding him to sell the animals at public auction, for the best price that can be obtained therefor." The form of the verdict, although not in compliance with the statute, might be treated as an irregularity, and the record be held sufficient and conclusive upon the question sought to be proved by the same, if the question was up and litigated. It would have been competent for the defendant on the trial to have made proof, if such was the fact, that the question was litigated before the magistrate, whether the horses came in from the road or not. But by the record it cannot be said that the question was litigated and determined that the horses did enter upon the complainant's premises from the highway. The question being an open one, the verdict of the jury in the plaintiff's favor is supported by the evidence.

We should unhesitatingly direct an affirmance of the judgment, if improper evidence had not been admitted over the defendant's objection, which in our opinion was unfavorable and prejudicial to his case. The defendant was called as a witness in his own behalf, and gave evidence in support of his

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contention that the horses came from the highway on to his premises. On the cross-examination the following questions were asked the plaintiff:

"Q. Have you since this action was commenced put your property out of your hands? A. I have mortgaged it.

"Q. Did you at the time this action was commenced, own a farm in your name, free and clear of incumbrance, in the state of Minnesota? A. I had a deed of 240 acres of land in Minnesota, or nearly that.

"Q. And was it free and clear of incumbrance at that time? A. There was no incumbrance on it.

"Q. Do you own that property now? A. No, sir.

"Q. What have you done with that property? A. I deeded it to my wife.

"Q. Did you own any personal property in the town of Clarkstown when this action was commenced? A. I did.

"Q. Have you mortgaged all that personal property for as much if not more than it is worth? A. I have mortgaged it, and I presume for as much as it is worth.

"Q. To whom? A. To James Moore and others.

"Q. Are these parties relatives of yours? A. Yes, sir."

Each one of these questions was in due time objected to as immaterial, and the same was overruled and the defendant excepted. That the objection was well made cannot be doubted, for the questions were both impertinent and immaterial, and we are unable to say that the facts developed by this evidence did not injure and prejudice the defendant's case, and it is very probable that it did.

The purpose of the examination is manifest, as indicated in the first inquiry: "Have you, *since* this action was commenced, put your property out of your hands?" with a view of having it appear to the jury that the defendant was incumbering and disposing of his property on the supposition that he would not succeed in his defense to this action, and if he did not, to have his property beyond the reach of the plaintiff's judgment and execution. The jury must have understood that, in the

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mind of the court, the evidence was pertinent for some purpose, or the same would not have been received over the defendant's objection. The pertinacity with which this line of inquiry was pursued on the part of the plaintiff, indicates that he believed that it would be of advantage to his side of the case. As the defendant relied in a large degree upon his own evidence to maintain his defense, the proof must have worked an injury to him, if the facts disclosed in the least prejudiced him in the minds of the jury.

In *Baird agt. Gillett* (47 N. Y., 180) the rule, as there laid down, is undoubtedly the correct one. "If improper evidence be given upon the trial which bears in the least degree upon the result it is fatal." As the evidence was improper, and as we are unable to say that it might not have biased the jury and influenced the result, its admission under objection was error, for which the judgment should be reversed.

New trial granted, with costs to abide the event.

SMITH, P. J., and HARDIN, J., concur.

N. Y. SUPERIOR COURT.

LENA BUCHHOLZ agt. HENRY BUCHHOLZ.

Complaint—Demurrer—Causes of action which cannot be united in the same complaint—Adultery and cruelty—Code of Civil Procedure, sections 484, 1757.

The two causes of action, adultery and cruelty, cannot be united in the same complaint.

Special Term, December, 1884.

THE complaint set up as the first cause of action several acts of adultery; as the second cause of action various acts of cruelty, and demanded in her prayer for relief a judgment dissolving the marriage or else a separation from bed and

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board and provision for separate maintenance. To this complaint defendant demurred on the ground of improper joinder of causes of action.

Bankson T. Morgan, for plaintiff.

Charles M. Beattie, for defendant.

TRUAX, J.—The two causes of action set up in the complaint are not embraced in section 484 of the Code of Civil Procedure, and therefore they are improperly joined.

The issue of adultery must, on the application of either party, be tried by a jury (*sec. 1757 of Code of Civil Pro.*), while the other issues may be tried before the court without a jury.

Demurrer sustained with leave to amend, without costs.

NOTE. By the above decision the law seems now to be settled that the two causes of action of adultery and cruelty cannot be united in the same complaint. The old case of *McIntosh* agt. *McIntosh* (12 *How.*, 289) formerly settled the practice in this class of cases, but it was held at general term, supreme court, third department, in *Doe* agt. *Roe* (28 *Hun.*, 19), that many of the reasons stated by the court in the above case did not apply in the present state of the practice. Judge BARRETT also stated, in an *obiter* opinion, that the law should favor the settling of all matrimonial differences in the same action. The above decision goes outside of the ordinary reasoning applied in previous cases, namely, that the evidence is incongruous, and the relief sought different and alternative — the party asking either for a divorce or a separation, and holds that these causes of action cannot be united because in the issue of adultery a trial by jury may be demanded (*Code of Civil Pro.*, *sec. 1757*), while the other issues may be tried before the court without a jury. It also holds that the two causes of action are not embraced in section 484, Code of Civil Procedure, and, therefore, cannot be united under the Code.—[Ed.]

De Vivier *et al.* agt. Smyth.

N. Y. CITY COURT.

CHARLES A. DE VIVIER *et al.* agt. THOMAS SMYTH.

Supplementary proceedings—Examination of third persons—Receiver—
When may be appointed—Code of Civil Procedure, sections 2141, 2146,
2147, 2164.

A receiver may be appointed on the conclusion of the examination of a third person in supplementary proceedings, either before or after the return of the execution against the judgment debtor.

Special Term, December, 1884.

E. Bartlett, for motion.

Guggenheimer & Utermeyer, opposed.

McADAM. C. J. — Frederick Hackman, a third person, having property belonging to the judgment debtor, was examined under an order supplementary to the issuing and before the return of the execution herein.

The plaintiff moves for the appointment of a receiver, and the third person objects that the application cannot be founded on the examination of the third person, particularly before the return of an execution unsatisfied. It was held under the old Code that a receiver could not be appointed where supplementary proceedings were instituted before the return of the execution (*Darrow agt. Lee*, 16 *Abb. Pr.*, 215). Mr. Throop, in a note to his edition of the Code (*see note preceding sec. 2464*), says: "The books are full of cases where the validity of such appointments has been tacitly, if not expressly recognized," and he refers to *Tillotson agt. Wolcott* (48 *N. Y.*, 188), and *West Side Bank agt. Puglsey* (47 *id.*, 368). He adds "that the practice of appointing a receiver in proceedings taken before as well as after the return of an execution, had become so inveterate that the commissioners were unwilling to propose its abrogation."

In order to effectually preserve the right to appoint a

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receiver before, as well as after, the return of an execution, section 2464 provides that, "at any time after making the order requiring the judgment debtor, or any other person, to attend and be examined, the judge * * * may make an order appointing a receiver of the property of the judgment debtor," &c.

The same section provides for notice to the judgment debtor and for cases in which such notice may be dispensed with. In the present instance the judgment debtor could not be found, and the judge dispensed with notice to him. Section 2441, in regard to supplementary proceedings against third persons, is in harmony with section 2464 (*supra*), and clearly indicates that a receiver may be appointed upon such an examination, either before or after the return of the execution.

The fact that section 2446 authorizes the judge to make an order permitting the third person to pay the sheriff on account of the execution in his hands, money conceded to be due to the judgment debtor, and the additional fact that section 2447 authorizes the judge to make an order directing the third person to deliver over property in his possession to the sheriff, does not limit the power of the judge, for the section last referred to provides that the money or property be delivered to the sheriff, "unless a receiver has been appointed," &c.

The fact of indebtedness to the judgment debtor is conceded by the third person, but the amount has not as yet been fully ascertained, so that no order for the payment over of a specific sum can be made.

It follows, therefore, that the application for the appointment of a receiver is appropriate, and that the application, therefore, must be granted.

Muller agt. Bush and Denslow Manufacturing Company.

SUPREME COURT.

GEORGE F. MULLER, respondent, agt. THE BUSH AND DENSLOW MANUFACTURING COMPANY, appellant.

Bill of particulars — Not allowed in suit for damages to property negligently inflicted — Code of Civil Procedure, section 531.

A bill of particulars should not be allowed of the damages claimed in a suit arising from injuries negligently inflicted

Where the plaintiff's house was injured by an alleged negligent explosion in defendant's oil works:

Held, that a bill of particulars of the plaintiff's demand was properly denied.

Second Department, General Term, December, 1884.

Before BARNARD, Ch. J., and DYKMAN, J.

THIS suit was to recover the damages to the plaintiff's house, located in the city of Brooklyn, from an alleged negligent explosion in defendant's oil works in the same neighborhood. The defendants, under section 531 of the Code, moved at special term, before justice BARTLETT, for a bill of particulars of the plaintiff's claim upon affidavits stating, among other things, the merits of their defense; that the defendants possessed no knowledge concerning the character of the property injured, neither could they obtain it after diligent inquiry, and could not safely proceed to trial without the particulars sought for. The plaintiff, in opposition, showed that the defendants had fully examined the injuries before the motion, had been given full opportunity so to do, and knew as much about it as the plaintiff, and further that the builders had not yet repaired the injuries as the premises were occupied by a tailor who being then in his busy season could not be disturbed and the plaintiff could not, therefore, give his exact damages.

Justice BARTLETT denied the motion, and the defendants appealed.

Muller agt. Bush and Denslow Manufacturing Company.

Alfred B. Cruikshank, for the appellant, claimed :

I. That defendants were entitled to the particulars to inform them of the precise limit of the plaintiff's claim (*Steebinger agt. Lockhouse*, 21 *Hun*, 457; *Tilton agt. Beecher*, 59 *N. Y.*, 184; *Dwight agt. Germania Co.*, 22 *Hun*, 173; *People agt. Nolan*, 10 *Abb. N. C.*, 478, 479; *Matthews agt. Hubbard*, 47 *N. Y.*, 428).

II. Bills of particulars have been granted in similar cases (*Robinson agt. Corner*, 13 *Hun*, 291; *Hayes agt. Bush*, *MS.*, *Special Term*; *Leigh agt. Atwater*, 2 *Abb. N. C.*, 419; *Gee agt. Chase*, 12 *Hun*, 630; *Wetmore agt. Jenny*, 1 *Barb.*, 53; *Miller agt. Kent*, 60 *How.*, 388; *Mayor agt. Marriner*, 49 *id.*, 36; *Eberhardt agt. Schuster*, 6 *Abb. N. C.*, 141; *Friedberger agt. Bates*, 24 *Hun*, 375).

III. The objection that plaintiff is not yet possessed of full information is no answer to the motion (*People agt. Nolan*, *Id.*).

IV. The discretion to grant the motion rests finally with the general term (*Miller agt. Kent*, *Id.*; *Security Bank*, agt. *Nat. Bank*, 2 *Hun*, 287; *Jeffries agt. McKellop*, 2 *id.*, 351.)

Henderson Benedict, for respondent, claimed :

I. That according to the decisions in this state, in the United States and in England, a bill of particulars should not be granted of damages in negligence cases whether the injuries be to person or property (*Bernhard agt. Dyer*, 3 *Law Bull.*, 92; *Dooley agt. Royal B. P. Co.*, 1 *id.*, 18; *Murphy agt. Kip*, 1 *Duer*, 659; *People agt. Marquette*, 39 *Mich.*, 437; *Retallick agt. Hawkes*, 1 *Meeson & W.*, 573; *Peters agt. Philadelphia*, 12 *W. N. C. [Pa.]*, 51; *Wicks agt. MacNamara*, 3 *H. & N.*, 568; 27 *L. J. Exch.*, 419; *Stannard agt. Ullithorne*, 3 *Bing. N. C.*, 326; *Walker agt. Fuller*, 29 *Ark.*, 448).

II. The defendants were allowed full opportunity to examine the injuries, availed themselves of the privilege before the motion, and knew as much as the plaintiff about it. This alone bars the motion (*Depew agt. Leal*, 5 *Duer*, 663; *Powers*

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agt. *Hughes*, 39 *N. Y. Super. Ct.*, 482; *Young* agt. *De Mott*, 1 *Barb.*, 30; *Blackie* agt. *Wilson*, 6 *Bosw.*, 681).

III. Defendants should have moved to make the complaint more definite. The evidence can be obtained by an examination before trial. The order was discretionary and should be affirmed.

DYKMAN, *J.*—The plaintiff has commenced this action to recover damages sustained by reason of injuries to his house from an explosion of the defendants oil works. The complaint states the injuries with considerable particularity, and the amount of damage sustained. The defendant desiring a bill of particulars of the items of damage made a motion therefor to the special term which was denied, and an appeal is brought from the order of denial. This is not a case where the plaintiff should be required to furnish particulars. The action is for damages which the plaintiff cannot specify with certainty; the amount will depend on proof to be furnished after examination of the injuries and may well consist of the testimony of experts.

Great caution should be exercised by the courts in requiring parties to furnish particulars in actions for damages resulting from negligence. It is usually impossible for a plaintiff to know with any degree of precision what his proof will be and the bill of particulars would in most cases of that character be an instrument of embarrassment and injustice. In this case the discretion of the court was wisely exercised and the order should be affirmed with ten dollars costs and disbursements.

BARNARD, C. J., concurred.

Order affirmed, with ten dollars costs and disbursements.

Heenan agt. New York, West Shore and Buffalo Railway Company.

COUNTY COURT.

JOHN HEENAN agt. THE NEW YORK, WEST SHORE AND BUFFALO
RAILWAY COMPANY.

Domestic corporation, when deemed resident — County court — Jurisdiction in action against domestic railroad corporation — Complaint — Sufficiency as to residence — When jurisdictional questions may be raised by answer — Code of Civil Procedure — Sections 341, 488, 498, 507.

Under section 341 of the Code of Civil Procedure the county court has no jurisdiction in an action against a domestic railroad corporation, unless its principle office is located within the county, or the summons is served in the county in which the action is brought and in which some of its business is transacted.

In an action against a railway corporation an allegation in the complaint that a part of the line of the road is run and operated within the county is sufficient as to residence.

Except where a demurrer may be interposed, any jurisdictional question may be raised by the answer and a general appearance with such an answer is no waiver of the objection.

Albany, December, 1884.

JOHN C. NOTT, *County Judge.*

ACTION to recover damages occasioned by the defendants negligently running one of its locomotives against a horse and wagon of the plaintiff injuring the same. Other facts are stated in the opinion.

Ira K. Place, for defendant.

B. R. Heyward, for plaintiff.

NOTT, *County Judge.* — This is an action to recover damages for injury to personal property caused by defendant's negligence in operating its railroad through the village of West Troy, in this county. The case was tried and submitted to the jury, which rendered a verdict for the plaintiff. The defendant now moves for a new trial, and that the complaint herein be

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dismissed. Two questions are presented for the consideration of the court, first, whether this court has such jurisdiction as to entertain the action; and second, if it has not, has the defendant waived, or is it concluded from raising the point. The complaint alleges that the defendant is a domestic corporation under our laws, and is engaged in the business of carrying freight and passengers for hire in various parts of the state, including the county of Albany, and that a part of its line of road is located in this county. The answer of the defendant admits that it is a domestic corporation, and avers that its principal place of business is and was at and long before the commencement of this action established by its articles of association and actually located in the city of New York; that its principal place of business never was established or located in the county of Albany, and that the summons was served upon defendant in the city of New York. It also puts in issue the various allegations in the complaint. On the trial it was established that the defendant, being a railroad corporation, operated its road through various counties of this state, including Albany county, and that by the articles of association, and in fact, its principal place of business is and was located in the city of New York, and that the summons herein was served upon one of the officers of the defendant in the city of New York.

Corporations created under the laws of this state are residents of the state, and an examination of the adjudications of our courts will show that their residence may be localized into one county or exist in many counties at the same time. For the purpose of ascertaining the place of venue in the supreme court against a railroad company, any county in which it operates its road may be regarded as its residence (*Pond agt. H. R. R. Co.*, 17 *How.*, 543). So with reference to an action in the justices' court (*Belden agt. The N. Y. & H. R. R. Co.*, 15 *How.*, 17; *Sherwood agt. The S. & W. R. R. Co.*, 15 *Barb.*, 650). So with regard to highway labor (*The People agt. H. R. R. Co.*, 31 *Barb.*, 138). So for the purposes

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of taxation (*The People* agt. *Fredericks*, 48 *Barb.*, 173 ; 48 *N. Y.*, 70). If there was no special provision in regard to the county court, these authorities would control us and we should hold the action could be maintained against the defendant in this county.

The Code of Civil Procedure provides that for the purpose of determining the jurisdiction of the county court, a domestic corporation or joint-stock association whose principal place of business is established by or pursuant to a statute, or by its articles of association, or is actually located within the county, is deemed a resident of the county, and personal service of a summons made within the county as prescribed by the Code is sufficient (*Sec.* 341). Our jurisdiction, therefore, by this provision, in the case of a domestic corporation, depends first upon the location within our county of its principal place of business, whether by force of a special statute or its articles of association, or its actual location ; and secondly, personal service of the summons within the county upon one of those of its officers who may be served under the Code of Civil Procedure with a summons in an action against it.

The provisions of the constitution in reference to the county court (*art.* 6, *sec.* 15) are broad enough to permit the legislature to confer this power upon the county court in the cases of corporations doing business in the county, and that it is so is eminently proper to cover cases where large business enterprises are carried on within the county, and some of its chief officers are within the county directing its important offices, although the principal office may be located in another county (*Gamp* agt. *Pratt*, 7 *Daly*, 197, *distinguishing Landers* agt. *The S. I. R. R. Co.*, 53 *N. Y.*, 450).

Here the principal place of business of the defendant, by its articles of association, and in fact, is located within New York county, and the summons was not served in this county. The conclusion reached is that this court has not jurisdiction over the defendant.

This brings us to the consideration of the second question :

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Has the defendant waived, or is it concluded from raising the objection? The plaintiff insists that the defendant having answered and appeared generally in the action, although by its answer it raised the issue of its residence, it cannot now say that it is a non-resident of the county, as the court could acquire jurisdiction of the defendant by the service of the summons upon a proper officer of the company within the county, which could not be done in the case of an individual.

I am of opinion that the allegations of the complaint as to residence were sufficient, and as the defect of which the defendant complains did not appear on the face of the complaint, he could not demur (*Code, sec. 493*). The objection to the jurisdiction was therefore properly taken by answer (*Code, sec. 493; Holbrook agt. Baker, 16 Hun, 176; Mayhew agt. Robinson, 10 How., 162-165*), and was not waived by appearance in the action and an answer therein setting up the objection (*Sullivan agt. Frazer, 4 Robt., 620; Wheelock agt. Lee, 74 N. Y., 497, 498*).

In opposition to the rule at common-law, under the Code, a defendant may plead as many defenses as he has, whether, as formerly denominated, to the jurisdiction in abatement or in bar (*Code, sec. 507; Sweet agt. Tuttle, 16 N. Y., 465*). It follows, therefore, that the general appearance of the defendant, distinctly by its pleading giving notice of its intention to raise the question of jurisdiction, is no waiver, nor does it conclude the defendant from insisting on the want of jurisdiction of this court (*Landers agt. The S. I. R. R. Co., 53 N. Y., 450; Davidsburgh agt. The K. L. Ins. Co., 90 N. Y., 526*). The cases cited by the plaintiff's counsel (*Paulling agt. Hudson Man. Co., 2 E. D. Smith, 38; Ballard agt. Burrows, 2 Robt., 206; Olcott agt. McLean, 73 N. Y., 223*) do not apply to this case.

An order must be entered granting the motion of the defendant and awarding a new trial; and the complaint should be dismissed.

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NOTE.—The principal case holds that the county court has jurisdiction in actions against domestic corporations:

First. In the county where the principal office is located.

Second. In the county where the summons is served, although the principal office be located elsewhere, if its business is transacted in whole or in part in the county.

The Code (*sec* 341) confers jurisdiction in those two cases, and a question suggests itself whether the later clause of this section is constitutional.

In *Landers agt. The Staten Island Railroad Company* (53 *N. Y.*, 450) it was held that such an analogous provision with reference to the city court of Brooklyn was void. In the case of joint debtors, where one is served with process, the others residing out of that city, a judgment may be taken in form against all, but can affect only the individual property of the defendant served and the property owned jointly by all (*Hoag agt. Lamont*, 60 *N. Y.*, 90; *S. C.*, 16 *Abb. Pr. R.* [*N. S.*], 91, 389; see, also, as to same court, *Davidburgh agt. The Knickerbocker Life Insurance Company*, 90 *N. Y.*, 528; *Wheelock agt. Lee* 74, *N. Y.*, 495). But these decisions have been explained in *Gemp agt. Pratt* (7 *Daly*, 197), judge J. F. DALY, says: "In *Bidwell agt. Astor Mutual Life Insurance Company* (16 *N. Y.*, 263) and *International Bank agt. Bradley* (19 *id.*, 245) judgments of the superior court of the city of Buffalo, a local court, were sustained, the cause of action having arisen in that city, but the defendants served elsewhere, being non-residents of the city. * * * But in the cases cited respecting the jurisdiction of the superior court of Buffalo, the question of the constitutionality of the provisions of law was not considered; and in the cases respecting the jurisdiction of the city court of Brooklyn (53 *N. Y.*, 450; 60 *N. Y.*, 96). There is no express decision that such jurisdiction was properly conferred, but, on the other hand, no intimation to the contrary. * * * Whatever enlarged jurisdiction, conferred by the act of 1873, does not fall within the view of the decisions in the cases of *Landers* and *Lamont* (*supra*), but may be exercised without violating the spirit of those cases, it is the duty of this court to exercise when suitors require it." Section 15, article 6 of the constitution, provides: "The county court shall have the powers and jurisdiction they now possess, until altered by the legislature. They shall also have original jurisdiction in all cases where the defendants reside in the county. * * * They shall also have such other original jurisdiction as shall from time to time, be conferred upon them by the legislature." This provision is much broader than that of section twelve of the same article relating to city courts. The cases cited by judge NORR show that a domestic corporation has a residence wherever it does business (*and cases cited in 1 Rorer on Railroads*, 64, *et seq.*), and but for the restrictive words of the Code (*sec* 341), the county court would have jurisdiction over such corporations, irrespective of the location of their principal office, as they possessed prior to the amended judiciary article (*See Conroe agt. The Nat. Pro. Ins. Co.*, 10 *How. Pr.*, 408).

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THE COMPLAINT.

The jurisdiction of a superior city court must always be presumed, and it is not necessary to set forth in the complaint any of the jurisdictional facts (*Code, sec. 286; Brooks agt. Mexican Nat. Cons. Co., 50 N. Y. Supr. Ct. R., 287*). The Code contains no such provision in reference to the county court. In the county court, if the summons and complaint claim over \$1,000, there is no power to amend so as to bring it within the constitutional limit (*McIntyre agt. Carriere, 17 Hun, 64; see Lenhard agt. Lynch, 62 How. Pr., 56, and Sweet agt. Flanagan, 61 How. Pr., 327*), although if the summons was for relief, the complaint may be amended in that respect (*McIntyre agt. Carriere, supra*). Following *Frees agt. Ford (6 N. Y., 176)*, the general term of the fourth department held that to confer jurisdiction on the county court, the complaint must show upon its face that the defendant is a resident of the county in which the action is commenced (*Judge agt. Hall, 5 Lane., 60; but see Holbrook agt. Baker, 16 Hun, 176*). In *Gracie agt. Palmer (8 Wheat., 609)*, the United States supreme court held that it is not necessary to aver on the record that the defendant in the circuit court was an inhabitant of the district, or was found therein at the time of serving the writ (*Field's Fed. Jud., 128, 177, 191*). The general railroad acts do not require corporations formed under them to indicate a principal office or place of business (*Colby's N. Y. R. R. Laws, 6, 559*). As to other corporations see *Southworth & Jones on Corporations (14); The People agt. Beach (19 Hun, 259)*.

DEMURRER OR ANSWER.

Holbrook agt. Baker (supra) disapproves of *Judge agt. Hall (supra)*, and holds that the defense of non-residence must be taken by answer, and unless so taken it is waived (*Dake agt. Miller, 15 Hun, 356; Potter agt. Neal, 62 How. Pr., 158*). In *Judge agt. Hall* the court sustained a demurrer to a complaint which contained no allegation as to the residence of the defendant within the county. A party defendant may be added in a proper case, although the moving papers fail to show residence of the party within the county on the ground that "the question of jurisdiction is personal to Doyle himself, and if he is not a resident of the county he may elect not to raise the question" (*Lewin agt. Wright, 31 Hun, 327, 329*).—[ED.]

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SUPREME COURT.

JOHN P. GRAFF *et al.* agt. JOHN P. KINNEY and FREDERICA M. KINNEY.*Husband and wife—Business partnerships between them authorized.*

Husband and wife have the capacity to enter into a contract of copartnership for the purpose of carrying on a trade or business, and contracts made by such a firm are enforceable against the wife's estate. This is adverse to *Fairlee* agt. *Bloomington* (67 *How.*, 292).

Kings Special Term, December, 1884.

BROWN, J.—The complaint in this action alleges that the note sued on was made by the defendants under their firm name of J. P. Kinney & Co.; that the defendants are husband and wife and that the materials for which said note was given were furnished for and benefited the separate estate of the wife.

It is not alleged that Mrs. Kinney personally signed the note, and her individual name does not appear on it. She cannot therefore be made liable upon it unless the signature John P. Kinney & Co. is sufficient to bind her, and this depends on the further question whether there was a valid partnership existing between her and her husband. The question is therefore directly presented whether a husband and wife can enter into a copartnership for the transaction of business.

There is in the complaint no direct allegation of partnership, and none that the defendant is engaged with her husband in carrying on business; no point is made of this however, and it may be assumed that the allegations that the note was made by the defendants under their firm name is a sufficient allegation of a partnership carrying on a trade or business, supposing such a partnership legally to exist.

The question whether a husband and wife can form a copartnership and carry on a firm business has never been

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decided by the court of appeals of this state, nor by any of the general terms, so far as I am informed. It has been decided both ways by the special term (*Young agt. Winslow, Daily Reg., May 10, 1882; Fairlee agt. Bloomingdale, 67 How., 292*).

The court of appeals have however decided two questions, which are I think decisive of the case: First. It has been decided that a married woman may contract a business partnership and carry on business as one of a firm (*Bitter agt. Rathman, 61 N. Y., 512; Scott agt. Conway, 58 N. Y., 619*). Second. That she may contract with her husband in reference to her separate estate (*Bodine agt. Killeen, 63 N. Y. 93; Owen agt. Cawley, 36 N. Y. 600*). Assuming, therefore, these two questions to be decided in this state, I am unable to see the distinction between a contract which a married woman enters into with her husband under which he manages her separate estate or business as her agent, and a contract of partnership which is nothing more than a mutual agency by each in reference to the common business of both.

Section 2 of the act of 1860, from which a married woman derives power to carry on any trade or business cannot, in my judgment, be construed as empowering her to engage in business solely in her own name and as denying to her the power to form a partnership with any one for that purpose. The words "sole and separate account" in that section do not limit or qualify the words "trade or business;" this sufficiently appears from the punctuation of the sentence. By this section the legislature intended to confer upon married women the power to do three things: First. To bargain, sell, assign and transfer their separate personal property. Second. To carry on any trade or business. Third. To labor on their sole and separate account. The first two a married woman had no power to do at all under the common-law; the last she could do, but the wages for her labor belonged to her husband. To confer upon her the power to carry on a trade or business was to give her a right that prior to the passage of this act

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she had not enjoyed. To declare that she might labor and perform services, would have conferred no new right upon her, but to declare the wages of her labor to be free from the control of her husband was to confer upon her a new and substantial right, and to accomplish this the legislature declared she might "perform labor and services upon her sole and separate account." I am not unaware that in the first section of the act the words "sole and separate" are applied to the "trade and business" as well as to her "labor and services;" but this section is not the one that qualifies her for doing these things, but is declaratory solely of what constitutes a married woman's separate estate.

I have been referred to, and have examined with great care, the very able opinion of Mr. justice WESTBROOK upon this question: The argument in that opinion is based on the proposition that the words "sole and separate" limit the words "trade or business" in section 2 of the act. Carried out to its logical conclusion this argument denies to a married woman the power to enter into a partnership with any person.

In the case of *Bitter* agt. *Rathman*, above cited, the commission of appeals held that she could contract a valid partnership, and although it was conceded that she held her interest in the firm upon a secret trust for her husband, the court held that she could maintain an action for dissolution to protect her apparent rights, and that she was liable as a partner to the creditors of the ostensible firm.

The court say: "The defendant excepted to the conclusion that the plaintiff was a partner of the defendant, for that being a married woman she could not, in law, be his partner."

* * * "Yet she having suffered herself to be regarded by the public as a partner *was liable as such to the creditors of the ostensible firm, and having thus exposed herself to such liabilities she had to such extent the right as against either the defendant or her husband to be protected out of the share which would belong to her in her capacity as trustee for her husband, at whose instance she undertook the trust.*" If she

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could, in a partnership of the character which existed in the case cited, be made liable to the partnership creditors, she certainly cannot claim immunity from the debts of a firm in which she has enlisted her separate estate and her own services. To the same effect is the decision of the court of appeals in the case of *Scott agt. Conway* (58 *N. Y.*, 619). These cases indicate sufficiently the drift of opinion of the highest court of the state upon this question, and should be followed by the special term unless directly overruled by later cases. I have been referred to none that are in conflict with them. In none has the question of the power of a married woman to enter into a business partnership been discussed. From the cases cited I think it must be regarded as settled in this state that a married woman may contract a valid business partnership.

Assuming, therefore, that a married woman has the power to enter into a contract of partnership, the question whether there can be such a partnership between husband and wife depends upon the legal capacity of husband and wife to contract with each other in reference to the wife's separate estate. That such contracts may be made has been repeatedly decided in this state. The husband may be the wife's agent (*Knapp agt. Smith*, 27 *N. Y.*, 277; *Kluender agt. Lynch*, 4 *Keyes*, 361; *Freiberg agt. Braniyan*, 18 *Hun*, 344; *Bodine agt. Killeen*, 53 *N. Y.*, 93; *Owen agt. Cawley*, 36 *N. Y.*, 600). He may assign to her a chose in action (*Seymour agt. Fellows*, 77 *N. Y.*, 178).

I can see no difference between the power to make one contract more than another. The power exists with reference to the separate estate of the wife, and the contract with reference to that estate may be made with the husband as well as with another. The legal capacity is the same in all cases. The question of fraud, or opportunity to defraud, or the opportunity to the husband to control and perhaps squander the wife's property have no place in the discussion. If the wife has the capacity to contract with the husband with reference to her separate estate, there is no limit put upon this

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power in the statute. The courts of this state have decided that she has such power, and I am unable to see by what principle it may be upheld as to one class of contracts and denied as to others.

The Massachusetts cases deny to the wife the power to enter into contracts of partnership, but it is worthy of remark that their decisions forbid a partnership between a married woman and a person not her husband (3 *Allen*, 127; 5 *Allen*, 460; 7 *Allen*, 481). As I have shown, such is not the law of this state, and these cases cannot therefore be regarded as an authority.

There is nothing in the case of *Coleman agt. Burr* (93 *N. Y.*, 17), which conflicts with the views here expressed. The remark of EARL, J., "that the statute touches a married woman in her relation to her husband only so far as they relate to her separate property and business, and the labor she may perform on her sole and separate account," is in entire harmony with the cases cited and the construction I have given to the statute. It is not pretended that apart from the control and use of her separate property and her ability to labor on her own account that the common-law relation of her husband and wife are changed.

My conclusion is, that the courts of the state have settled two questions: First. That a wife may contract a copartnership with a person other than her husband and carry on business as a member of such firm. Second. That with reference to her separate estate she may contract with her husband the same as if she was a *feme sole*. From these decisions I think it follows, necessarily, that husband and wife have the capacity to enter into a contract of copartnership, for the purpose of carrying on a trade or business, and that contracts made by such a firm are enforceable against the wife's estate.

The demurrers are overruled, with costs.

NOTE.—The improvement in the legal *status* of married women in this country has been rapid and steady. By the old common-law the wife was a legal nonentity; in many of our states the tendency of legislation and

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adjudication has been to make her co-equal with her husband before the law. The above decision at once enlarges the rights and responsibilities of married women in this state, and as the law is interpreted they may form business copartnerships with their husbands, and they may also be held separately liable for the firm debts, thus putting husband and wife in business on a common legal footing with merchants and traders generally. —[ED.]

SURROGATE'S COURT.

In the Estate of WASHINGTON M. SMITH, deceased.

Abatement—Revival—Death of administrator pending proceedings for settlement of his account — Effect of — Code of Civil Procedure, sections 755, 765, 2606, 3347.

Where pending proceedings for the judicial settlement of the account of an administrator, such administrator dies, the proceedings abate and cannot be revived against his legal representatives.

By section 2606 of the Code of Civil Procedure, as amended in 1884, the surrogate can require an accounting from a representative of a deceased executor or administrator, just as he might require it from the deceased executor or administrator himself after the revocation of his letters. Therefore where an administrator dies pending proceedings for the settlement of his accounts, in a new proceeding, his legal representatives can be directed to render a full account of such administrator's management of decedent's estate.

New York County, December, 1884.

ROLLIN, S. — Vernon K. Stevenson, now deceased, was in his lifetime administrator of this estate. An accounting proceeding, instituted by him as such administrator, was pending in this court at the time of his death. In December, 1883, the surrogate, by a written memorandum for counsel, announced the conclusions he had reached in regard to certain exceptions that had been taken to the report of a referee to whom the account and the objections thereto had been submitted.

As to one of the matters in controversy, leave was given

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the accounting party to offer additional evidence. Such evidence was afterward, and in Mr. Stevenson's lifetime introduced; but the issue upon which it bears has not been passed upon by the surrogate, and no decree has been entered settling in whole or in part the administrator's account. The petitioners, who are children of the decedent Smith, now pray that the accounting proceeding be revived and continued against the widow of Mr. Stevenson, who has lately been appointed his administratrix.

It is admitted that prior to the recent amendment of section 2606 of the Code of Civil Procedure (*see chap. 399, Laws of 1884*) the surrogate had no jurisdiction to cite A. as executor or administrator of B. to account for B.'s dealings as executor or administrator of C. with C.'s estate, except for such assets of C. as had come into A.'s possession (*Dakin agt. Deming, 6 Paige, 95; Montross agt. Wheeler, 4 Lans., 99; Farnsworth agt. Oliphant, 19 Barb., 30; Le Count agt. Le Count, 1 Demarest, 29; Bunnell agt. Ranney, 2 Demarest, 327*).

But by section 2606, as it now reads, the surrogate can require an accounting from a representative of a deceased executor or administrator, just as he might require it from the deceased executor or administrator himself after the revocation of his letters. There is no doubt, therefore, that in a new proceeding this administratrix can be directed to render a full account of her husband's management of decedent's estate. I am convinced, however, that the proceeding which has abated by Mr. Stevenson's death cannot be revived.

In *Leavy agt. Gardner* the special term of the court of common pleas permitted an action to foreclose a mechanic's lien to be continued after the death of the defendant against the defendant's executor. Its action was reversed at general term, and the reversal affirmed by the court of appeals (63 *N. Y.*, 624), upon the ground that the proceeding thus allowed to be continued was not an *action*, within the meaning of the Code,

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but was a *special proceeding* to which the Code provisions respecting the revival of actions had no application.

I am unable to find any reason for upholding in the case at bar the contention of this petitioner's counsel that might not in the case of *Leavy agt. Gardner* have been urged with equal or greater pertinency in behalf of the plaintiff Leavy. Section 755, which provides that actions shall not abate if the cause of action survives, does not apply to surrogates' courts, but section 765 is expressly made applicable thereto by subdivision 6 of section 3347. This section (765) forms part of title 4 of chapter 8 (the title that treats "proceedings upon the death of a party"), and declares that nothing in the title contained shall authorize the entry of a judgment against a party who dies before a verdict, report or decision is actually rendered against him, but that in such case the verdict, report or decision is absolutely void.

No "decision," within the meaning of that word in the section just quoted, has been rendered as to any of the matters at issue in the accounting proceeding (*Adams agt. Nellis*, 59 *How. Pr.*, 385; *Weyman agt. Bank*, 59 *How. Pr.*, 331), therefore no decree can ever be entered.

CITY COURT OF BROOKLYN.

WARREN BONNEY, appellant, agt. THE BUSHWICK RAILROAD COMPANY, respondent.

New trial — When should be granted in action for negligence.

Where a passenger upon a street car, subsequently to alighting, was pulled down by the conductor's holding on to him after starting the car:

Held, that he had a good cause of action against the railroad for the injuries sustained.

If a charge to the jury in mentioning the facts of a transaction as narrated by the defendant's witnesses makes a remark which, though correct as applied to the defendant's version, applies also to the plaintiff's version,

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and tends to cut him off from a recovery, it is error for which a new trial should be granted.

General Term, December, 1884.

Before McCUE, Ch. J., and REYNOLDS, J.

THIS suit was to recover for personal injuries received after the plaintiff, a man eighty-three years old and a passenger, had gotten down on the ground from defendant's horse car, in consequence of the conductor's holding on to his coat after starting the car, which precipitated the plaintiff to the pavement, breaking his hip. The defendant's witnesses testified that he fell after the car had passed on, and after the conductor had ceased to hold on to him.

The court, in the course of the charge, said: "It is unnecessary for me to tell you that if he fell after he had alighted from the car, after he had both feet on the ground, then he cannot recover."

Plaintiff's counsel excepted to the last clause. A verdict was rendered for the defendant, and the plaintiff appealed from the judgment and order denying a motion for a new trial on the minutes.

Henderson Benedict, for appellant:

I. Defendants were unquestionably responsible for the injury as narrated by the plaintiff; for the rule relieving masters from liability for malicious injuries inflicted by servants outside the scope of employment does not apply between a common carrier and its passengers, as it undertakes to protect them against any injury arising from the malice or negligence of its servants (*Stewart agt. Brooklyn City R. R.*, 90 *N. Y.*, 588).

II. Even under the general principle the defendants could not escape, for it is settled that if a servant in performing an act within his authority proceeds beyond his master's instructions and inflicts willful, malicious or reckless injury, his master is liable, and no proof is necessary of express authority to do

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the act if it was one (as in the present instance) implied from the nature of his position, as daily exercised under common observation (*Hoffman* agt. *N. Y. C. R.*, 87 *N. Y.*, 25; *Roods* agt. *D. L. & W. R.*, 64 *id.*, 129; *Cohen* agt. *D. D. E. L. R.*, 69 *id.*, 170; *Mott* agt. *Consumers' Ice Co.*, 73 *id.*, 543; *Shea* agt. *Sixth Ave. R.*, 62 *id.*, 180; *Higgins* agt. *W. T. C. Co.*, 46 *id.*, 234; *Jackson* agt. *Second Ave. R.*, 47 *id.*, 274).

III. Nothing except an express withdrawal of this erroneous instruction with a direction to disregard it, accompanied by a statement of the correct principle could have remedied it (*Walton* agt. *Wise*, 47 *Supr. Ct. [J. & S.]*, 512; *Chapman* agt. *Erie R.*, 55 *N. Y.*, 579; *Knuppel* agt. *Knickerbocker Ice Co.*, 84 *id.*, 488; *Mevey* agt. *Clar*, 45 *id.*, 235; *Avery* agt. *City of Syracuse*, 29 *Hun*, 540; *Vanfield* agt. *Baltimore & O. R.*, 46 *Supr. Ct. [J. & S.]*, 238).

IV. It was essential to except only, and not ask the question submitted to the jury to preserve the plaintiff's rights (*Allis* agt. *Leonard*, 58 *N. Y.*, 288; *Avery* agt. *City of Syracuse*, *supra*).

V. It was unnecessary to specify the grounds of exception or suggest an amendment to the charge (*Friend* agt. *Paten*, 10 *Abb. N. C.*, 311; *Goldman* agt. *Abram*, 9 *Daly*, 235).

T. S. Moore, for respondent.

PER CURIAM.—According to the plaintiff's own testimony, corroborated more or less by some of his witnesses, the conductor kept hold of him after he had got upon the ground and after the car had started, and by this means dragged him down thereby causing the injury. The evidence of the defendant was in substance that after the plaintiff had alighted and was clear of the car and the conductor, he fell through some misadventure of his own. It was probably in view of this evidence on behalf of the defendant that the trial judge remarked in the course of the charge: "It is unnecessary for me to tell you that if he fell after he alighted from

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the car, after he had both feet on the ground, then he cannot recover."

This instruction was perfectly correct as applied to the fall as described by defendant's witnesses, but the difficulty is that it applied also to the plaintiff's narration of the occurrence, and thus cut him off from all chance of recovery. If the jury believed his statement we think they might well have found a verdict in his favor.

For this reason the judgment should be reversed and a new trial granted, costs of appeal to abide the event.

SUPREME COURT.

In re THE E. M. BOYNTON SAW AND FILE COMPANY.

Corporations — Voluntary dissolution of — When receiver may be appointed — Report of referee in such cases, what must contain — Code of Civil Procedure, sections 2426, 2429.

The court has no power to appoint a receiver under proceedings for the voluntary dissolution of a corporation until the making of the final order dissolving the corporation.

Section 2426 of the Code of Civil Procedure requires the report of the referee to contain "a statement of the effects, credits and other property and of the debts and other engagements of the corporation and of all other matters pertaining to its affairs :

Held, that the requirement of the Code is one of substance and not of form, and a failure to comply with it renders the final order void.

Second Department, General Term, December, 1884.

John B. Whiting and Charles E. Chase, for certain judgment creditors, appellants.

Charles H. Luscomb, for respondents.

BROWN, J. — This is a purely statutory proceeding, and the court has no power or authority to act, except as such power is conferred by the statute. The authority for the appoint-

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ment of a receiver is given by section 2429 of the Code, and this can only be exercised upon granting the final order dissolving the corporation. There was no power in the court therefore to appoint a temporary receiver, and the order of November 2, 1883, was void. This view of the statute is in harmony with the decision of the courts (*Matter of French Mfg. Co.*, 12 Hun, 488; *Chamberlain agt. Rochester S. P. V. Co.*, 7 Hun, 557; *In re Open Board of Brokers*, 3 *Monthly L. B.*, 57).

The statute does not give the court control over the corporate property until the decision is made upon the return to the order to show cause. If such control had been given there would doubtless be, as an incident to such control, authority to restrain creditors from suing the company and to prevent any interference by creditors with the corporate assets (*Phoenix Foundry Co. agt. N. R. Cons. Co.*, 4th Dept., 19 *W. D.*, 439).

But in the case of "*The Eagle Iron Works*" (8 *Paige*, 385) the chancellor held that an injunction would not be granted in such a proceeding as the one we are considering, and said: "The statute has not given to the court any control over the property until the coming in of the master's report and the dissolution of the corporation." He pointed out the difference between a proceeding for a voluntary dissolution of the corporation and proceedings against corporations in equity, and held that in the former case creditors who by their diligence obtained a lien upon the corporate property could not be deprived of the preference they had acquired; while in the latter case the court might interfere by injunction to restrain the creditors' proceedings. I think, therefore, the order appointing the temporary receiver was void, and should have been vacated.

Another point is made by the appellant which I think is fatal to the proceedings: Upon the hearing upon the order to show cause, the court referred the matter to a referee "to take proof of the insolvency of the corporation and all matters

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relating thereto." This the court had power to do, and the Code provides (*sec.* 2426) that the report of the referee or decision of the court "must contain a statement of the effects, credits and other property, and of the debts and other engagements of the corporation, and of other matters pertaining to its affairs." The referee returned the testimony to the court, but made no report upon any of the matters mentioned in the statute, and there does not appear in the appeal papers to have been any decision of the court, except that contained in the final order. This, however, makes no mention of the matters required by the statute.

In the case of the *Pyrolusite Manganese Company* (29 Hun, 429), for a voluntary dissolution, a similar defect was held to be fatal to the proceeding. The requirement of the Code was one of substance and not of form, and a failure to comply with it renders the final order void.

The order appealed from must therefore be reversed, with costs, and the proceedings remitted to the special term to proceed anew upon the referee's report in the manner required by the statute.

BARNARD and DYKMAN, JJ., concurred.

SUPREME COURT.

THE PEOPLE OF THE STATE OF NEW YORK *ex rel.* WILLIAM E.
DEMAREST *et al.* agt. PATRICK FARLEY *et al.*

Injunction—Will not issue pendente lite in an action to try title to a public office.

In an action in the nature of a *quo warranto*, an injunction will never be issued in this state *pendente lite* restraining the party in possession of the office from exercising the functions thereof.

New York Chambers, December, 1884.

The People *ex rel.* Demarest *et al.* agt. Farley *et al.*

LAWRENCE, J. — This is an action in the nature of a *quo warranto*, in which the plaintiffs pray judgment that section 4 of the Laws of 1873, chapter 335, and the amendments to said act, passed June 13, 1873, chapter 757 of the Laws of 1873, chapter 515 of the Laws of 1874, chapter 400 of the Laws of 1878 and chapter 473 of the Laws of 1882, may be adjudged unconstitutional and void; that the defendants, who are now acting as the aldermen of the city of New York, may be ousted and removed from the offices which they respectively claim to hold; that the relators may have judgment; that they are and each of them is entitled to the office of aldermen, and to the rights, franchises, privileges and emoluments thereof, and have been so entitled since the first Monday of January, 1883, and that the plaintiffs may have judgment that the exercise of such rights, &c., be restored to the said relators, and that the said relators are collectively and individually entitled to exercise the powers and discharge the duties appertaining to the common council of the city of New York, and have been so entitled since the first Monday of January, 1883.

The claim of the relators substantially is that the provisions of chapter 137 of the Laws of 1870, as amended by chapter 574 of the Laws of 1871, are still in force, and were in force on the 7th day of November, 1882, at which time the relators claim that they were elected respectively to the office of alderman, pursuant to the provisions of said act, for the term of two years from the first Monday of January, 1883.

The complaint in the action was verified on the 23d of January, 1884, and the action appears to have been commenced at or about that time. On the 22d of December, 1884, Mr. justice ANDREWS granted an order directing the defendants to show cause, at special term, on the twenty-sixth instant, why an injunction should not be issued restraining the defendants, and each of them, their clerks, attaches and employes, from passing or enacting any resolutions or ordinances, or confirming or rejecting any commissioners, or heads of any departments

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of the city of New York, or in any manner acting as aldermen, or collectively as the common council of said city, and for such other and further relief as the court may deem just, besides the costs of this motion.

And it was further ordered that the above entitled defendants, and each of them, their clerks, attaches, employes and attorneys be in the meantime restrained, and they and each of them were thereby forbidden to suffer or commit any of said acts until the further order of this court.

On the twenty-third instant the presiding justice granted an order returnable at a special term on the twenty-fourth instant, directing that cause be shown why the order of the twenty-second instant, as far as the same restrains or enjoins the defendants from acting as a common council of the city of New York, or from acting as the aldermen and board of aldermen of the said city, or from passing or enacting any resolutions or ordinances, or confirming or rejecting any commissioners or heads of departments, &c., should not be vacated, annulled and set aside.

It is upon these two orders that the case comes before me for consideration. The proposition that all the acts relating to the electing of aldermen in the city of New York, passed since the year 1873, have been unconstitutional and void is a most serious one and ought not to be entertained by a justice sitting at chambers, unless it is perfectly apparent that there has been a clear and substantial departure from the provisions of the fundamental law (*In the Matter of the Petition of the Gilbert Elevated Railway* agt. *Kobbe*, 70 N. Y., 361; *People* agt. *Canal Board*, 55 N. Y., 390; *Matter of the United States*, 66 How. Pr. R., 535). In this case no specification is made in the complaint of the particulars in which it is claimed that the laws in question are in conflict with the constitution. The simple allegation being that the said laws and each and every one of the amendments thereto are unconstitutional and in violation of the laws and usages of the land and void *in toto*.

Bearing in mind that every presumption is in favor of the

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unconstitutionality of acts of the legislature and that an adverse or hostile construction is not sufficient to justify the court in holding them to be in conflict with the constitution. I should hesitate very long before determining that the acts which are referred to in the complaint in this action are in conflict with the constitution of the state, particularly in view of the fact that the plaintiffs have slept so long upon their rights, if any rights they have, and have not sought to restrain the defendants from exercising the powers and performing the duties of their office until just before the expiration of the term for which the defendants claim to have been elected. But it is not necessary for me, in disposing of this motion, to determine whether such acts are or are not constitutional, inasmuch as the relief which is sought upon this motion is an order for an injunction restraining the defendants in substance from doing any act, either collectively as the common council of the city or individually as aldermen of said city.

I understand the law to be perfectly well settled that in an action in the nature of a *quo warranto*, an injunction will never be issued in this state *pendente lite*, restraining the party in possession of the office from exercising the functions thereof.

In the case of *The People agt. Mattier* (2 Abb. [N. S.], 289) it was held by BOARDMAN, J., that in actions to oust persons exercising the duties of public officers under a claim of right, a temporary injunction restraining them from exercising the duties of the office pending the litigation should not be granted.

In *Lewis agt. Oliver* (4 Abb. Pr. R., 121) it was held that in an action in the nature of a *quo warranto*, being the proper remedy where an authorized person has usurped the office of alderman in a municipal corporation, an injunction could not be granted to restrain the incumbent from exercising the powers and performing the duties of the office. In that case the court determined that the election of the defendant was not legal, and yet the injunction was refused.

In the case of *The People ex rel. Wood agt. Draper* (4 How. Pr. R., 223), it was held by PEABODY, J., that in an

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action of *quo warranto* to determine the right to a public office, an injunction restraining generally the functions of the office is not authorized by law.

In *Morris agt. Whelan* (64 *How.*, 109), the application was for an injunction to restrain the defendant from acting as president of the common council of Troy, and it was distinctly held that where a person usurps and intrudes into a public office, civil or military, and the attorney general brings his action to oust him, no injunction can be obtained *pendente lite*.

In *Thompson agt. Commissioners of the Canal Fund* (2 *Abb.*, 248), Mr. justice MITCHELL held that the courts of this state have no power to restrain by injunction the acts of officers of the state who are proceeding under authority of a law of this state; and the fact that such law is unconstitutional forms no ground for granting such injunction.

In *The Mayor agt. Conover* (5 *Abb. Pr. R.*, 171), Mr. justice ROOSEVELT decided that a preliminary injunction, the effect of which would be in effect to oust a party, although only temporarily, from the exercise of the functions of an office, by preventing his access to the books and to papers appertaining to it, should not be granted. That the title to a public office could not be indirectly tried in an injunction suit brought to restrain a claimant of such office from interfering with the books and papers appertaining thereto.

Long prior to the decisions in the cases above referred to, chancellor WALWORTH had decided in the case of *Tappan agt. Gray* (9 *Paige's R.*, 507) that "this court ought not to assume the jurisdiction to oust an officer in no way connected with the administration of justice here, and over whose appointment it has no control, from an office the duties of which he is discharging under color of an appointment from the executive of the state, until his right to such office has been settled in a mode prescribed by law by the Revised Statutes for the determination of his claim," and as that would be the necessary effect of the injunction prayed for in that case, the chancellor reversed the decision of the vice-chancellor who had

From the fact that the same thing has been said to a
proliferation of persons regarding the internal security
the only form remaining is the one I have
it will be less but such a situation is even more
deficient in the sense of the law. If there is nothing in
the case of James M. Brown of San Francisco and the
confronted for the future according with the previous to which
I have referred. I cannot, of course, be termed as an
authority on the

But these reasons, and of the manner that no question should be put to a person, and that the temporary suspension of the person should be treated and as usual.

WILLIAM C. FRYER and LEANDER E. THORNTON vs. U.S.

Female anterior - Right in office cannot be used in a different manner.

A verification certified to by a female notary is valid as to third persons, and furnishes no ground for returning the pleadings. The parties to the record cannot test the eligibility of a female to hold office in any such collateral manner. The right can be tested only in a direct proceeding brought for the purpose in which the notary may defend her title.

Whether a female may hold public office in this state, *quære.*

Postal Term, January, 1885.

Findlay agt. Thorn *et al.*

C. G. Kidder, for motion.

W. Parker, opposed.

McADAM, C. J. — The reply interposed to the counter-claim contained in the defendant's answer was returned, because the certificate to the jurat is signed "Jennie Turner, notary public." The complaint and answer were verified, and unless the reply contains a legal verification the defendants had the right to return it as an unverified pleading. The defendants place their objection upon the ground that Miss Turner, being a female, is ineligible to public office, and cannot therefore legally perform the functions of a notary. Miss Turner was appointed by the governor, and the appointment was confirmed by the senate. She has filed her official oath and has received her commission and is in possession of the office exercising its functions, and her right to the office cannot be questioned except in a direct proceeding brought by the attorney general in the name of the people, in which the notary may defend her right to the office. It cannot be determined in the collateral manner in which the defendants present their objection. When the appointing power can lawfully be exercised upon a particular office, the appointee, after qualifying and entering upon the office, becomes an officer *de facto*; if not *de jure*, his acts are legal so far as the public is concerned, and his capacity or qualification for the office cannot be inquired into collaterally (*People agt. White*, 24 *Wend.*, 520; *People agt. Lambert*, 76 *N. Y.*, 220).

In *The People agt. Dean* (8 *Wend.*, 438) it appeared that a minor was appointed a commissioner of deeds. The clerk of the common pleas refused to administer the oath of office upon the ground that the appointee, being a minor, was incapable of holding the office. The supreme court held: "It is not the province of the officer to whom application is made to administer the oath of office to determine whether the person presenting himself is or is not capable of holding an office. It is the duty of such officer, on the production of the com-

Findlay agt. Thorn *et al.*

mission, to administer the oath. If an appointment has been improvidently made, there is a legal mode in which it may be declared void," and a *mandamus* was thereupon ordered directing the clerk to administer the official oath.

Whether a female is capable of holding public office has never been decided by the courts of this state, and is a question about which legal minds may well differ. The constitution regulates the right of suffrage and limits it to "male" citizens (*Const., art. 2, sec. 1*). Disabilities are not favored and are seldom extended by implication, from which it may be argued that if it required the insertion of the term "male" to exclude female citizens of lawful age from the right of suffrage, that a similar limitation would be required to disqualify them from holding office. Citizenship is a condition or *status*, and has no relation to age or sex (*Lectures of Prof. Dwight*).

It may be contended that it was left to the good sense of the executive and to the electors to determine whether or not they would select females to office, and that the power being lodged in safe hands was beyond the danger of abuse. If, on the other hand, it be seriously contended that the constitution, by necessary implication, disqualifies females from holding office, it must follow as a necessary consequence that the act of the legislature permitting females to serve as school officers (1880, *chap. 9*), and all other legislative enactments of like import removing such disqualification are unconstitutional and void. In this same connection it may be argued that if the use of the personal pronoun "he" in the constitution does not exclude females from public office, that its use in the statute can have no greater effect. The statute, like the constitution, in prescribing the qualifications for office, omits the word "male," leaving the question, whether female citizens of lawful age are included or excluded, one of construction.

I make these observations for the purpose of showing that the question whether females are eligible to public office in this state is one not entirely free from doubt, and should not therefore be decided where it arises, as it does here,

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incidentally and collaterally. When the law officers of the state see fit to test the question in a direct proceeding brought for the purpose, it will be time enough for the courts to attempt to settle the contention. In such a proceeding the case of *Robinson* (131 *Mass.*, 376, and that reported in 107 *Mass.*, 604), holding that females cannot hold public office, and those decided in other states that they can hold office, may be examined and considered.

For the purpose of this motion, it is sufficient to decide that the reply was verified before a person holding the office of notary public, under a commission granted by the legally constituted appointing power; that the defendants cannot, in a collateral proceeding, to which the notary is not a party, try the question of her eligibility to the office; that her acts are valid as to third persons and the parties to this record.

The motion to compel the defendants to accept the reply as a properly verified pleading will therefore be granted.

SUPREME COURT.

In the Matter of the General Assignment of DAVID T. DAVIS
et al. to OWEN D. PERRY.

Assignment — By copartners which does not cover individual property nor provide for the payment of individual debts.

Where an assignment was in substance as follows: "We, D., J., B. & E., all of Utica, comprising the firm of D., J., B. & Co., doing business as manufacturers in Utica, for one dollar to us paid, hereby assign to P. all of our personal and real property not exempt from execution, in trust for our creditors. We direct said trustee to take possession of all our estate and convert the same into cash for our creditors. We direct him out of the first to pay expenses of administration; and, whereas, divers persons have each indorsed notes and drafts for our use and benefit and for the benefit and accommodation of our firm, and we have given a mortgage on our stock and goods to P. the first indorser on most of said paper which has been used by us and is now held by parties to us

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unknown ; we, therefore, direct said trustee to pay all of said paper and bear said indorsers harmless from liability on account of indorsements for our said firm. We direct that said assignee next pay all of our debts in full, reserving to ourselves all moneys that remain in his hands after payment of all our debts :

Held, that the assignment did not cover individual property nor provide for the payment of individual debts.

Held, further, that a contestant not being a firm creditor, but only an individual creditor of two of the assignors, has no standing in court upon an accounting of the assignee.

Where assignors assign jointly, or as copartners only, neither the assignee nor the courts can reach the individual property of any one of them in any proceeding under the assignment, or in any attempt to enforce it.

Special Term, December, 1884.

MOTION on behalf of Edward A. Rowell to modify and confirm, and on behalf of Owen D. Perry to set aside, the report of a referee, appointed by the county court of Oneida county to take and state the account of said Perry, as assignee, under a general assignment for the benefit of creditors. As both the county judge and special county judge of said county are incapable of acting in this proceeding, it has been removed into the supreme court.

In July, 1875, David T. Davis, John I. Jones, Alpheus C. Beckwith and Daniel W. Ehresman formed a copartnership under the firm name of Davis, Jones, Beckwith & Company, and as such carried on a wholesale and retail clothing business in the city of Utica until the 24th of June, 1876, when they made a general assignment to Owen D. Perry for the benefit of creditors, of which the following is a copy :

“ Know all men by these presents, that we, David T. Davis, John I. Jones, Alpheus C. Beckwith and Daniel W. Ehresman, all of Utica, composing the firm of Davis, Jones, Beckwith & Company, doing business as wholesale and retail dealers and manufacturers of men's, youths' and boys' clothing, in the city of Utica, N. Y., for and in consideration of the sum of one dollar to us in hand paid by Owen D. Perry,

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of Utica, N., Y., the receipt whereof is hereby acknowledged, and of the stipulations and promises herein contained, we do hereby sell, assign, transfer and set over to the said Owen D. Perry all of our personal and real property, choses in action, and all property of every kind and description whatsoever or wheresoever situate, which is not by law exempt from levy and sale on execution, to have and to hold the same to himself, his successors or assigns, in trust nevertheless for the benefit of our creditors as hereinafter stated. We direct that the said Owen D. Perry as trustee take immediate possession of all our estate, both real and personal, and to convert the same and the whole thereof into cash as speedily as may be for the benefit of our creditors, and to dispose of the proceeds as follows: First. We direct that the trustee or assignee, Owen D. Perry, first pay out of the said estate by him held in trust all just and legal charges and expenses of administering this trust: Second. Whereas, Owen D. Perry, G. J. Griffiths, James A. Beecher, John E. Ehresman, Henry Ehresman, T. G. Beckwith, have each indorsed sundry promissory notes and drafts at different times to a large amount for our use and benefit and for the benefit and accommodation of our firm, as accommodation indorsers, some of said notes are indorsed by two or more of said parties as accommodation indorsers; and whereas we have executed a chattel mortgage on our stock and goods to Owen D. Perry, who is the first indorser on most if not all of said accommodation paper, which paper has been used and negotiated by us to sundry parties and is now outstanding and held by parties to us unknown, we therefore direct that the trustee, Owen D. Perry, pay and discharge all the outstanding paper indorsed by either of said parties by whomsoever held or owned, and to pay and discharge the same in full and to in all things bear said parties and each of them harmless from any and all liability on account of indorsements for our firm, by paying and discharging all such indebtedness in full: "Third. We direct that the assignee next pay and discharge all of our debts in full, reserving to

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ourselves all moneys that may remain in the assignee's hands after the payment of all our debts.

"Witness our hand and seal this 25th day of June, A. D. 1876.

"DAVID T. DAVIS. [L. s.]

"JOHN I. JONES. [L. s.]

"ALPHEUS C. BECKWITH. [L. s.]

"DANIEL W. EHRESMAN." [L. s.]

* * * *

"I, Owen D. Perry, trustee named in the within assignment, do hereby acknowledge the acceptance of the within trust, and agree to faithfully perform the duties therein imposed.

"Witness my hand and seal this 26th day of June, 1876.

"OWEN D. PERRY." [L. s.]

Said business had been carried on by said Davis & Jones, as copartners; from 1859 to January 1, 1874, by said Davis, Jones, Beckwith and one Horn; from the latter date to July 9, 1875, when Horn retired and Davis, Jones and Beckwith continued until July 25, 1875, when the firm, composed of said assignors, was formed as aforesaid. At the date of the general assignment each of said firms had some assets and owed some debts, except the firm of Davis, Jones, Horn & Beckwith, which had no assets, and owed no debts. Some of the assignors were owing individual as well as firm debts. While the firm owned no real estate, some of the members did, as individuals, but it was of no value above the incumbrances thereon.

On the 25th of September, 1877, there was a final accounting in the usual form and a decree made by the county court distributing all the assets reported and discharging the assignee and his sureties. The dividends paid the preferred claims and a small per centage upon the unpreferred. On the 10th of December, 1877, upon the application of Edward N. Rowell, who held the joint and several note of said David T. Davis and John I. Jones for \$1,776, dated January 20, 1876, an order of reference was made by the county court "to inquire

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and report what, if any, property passed to said assignee under said assignment, applicable to the payment of the debts of Davis and Jones, two of said assignors, or the debts of either of them." Upon the coming in of the report of the referee, and on the 6th of May, 1879, an order was made "opening said decree and accounting so far as said Rowell was concerned" and permitting him to file his proof of claim *nunc pro tunc* and to contest the accounting of the assignee, who was required to account "for his proceedings as assignee forthwith before" a referee appointed for the purpose. On the 7th of February, 1883, this referee filed his report, whereby he found that assets of great value passed to said assignee under said assignment that he had not accounted for, and requiring him to account for a balance of \$13,865.63. He held, in effect, that the assignment covered individual property as well as the copartnership property remaining of each of said firms, and that the assets should be so marshaled according to the rule in equity as to apply the assets of each firm to the payment of its own debts and to apply the surplus according to the respective interests of the partners to the payment of their individual debts; that as the decree was opened only as to said Rowell, no claim but his against either firm or any member thereof individually could be proved on this accounting.

He recommended that from the balance of \$13,865.63, unaccounted for, there should be deducted \$4,200 for counsel and referee's fees; that as the remainder, when apportioned among the partners according to their mutual rights, showed the sum of \$1,547.89 due to Davis and \$1,927.90 due to Jones, the claim of said Rowell upon his joint and several note against David T. Davis and John I. Jones, should be next paid in full. But he made no recommendation as to what should be done with any part of the surplus still remaining in the hands of the assignee. The report proceeds upon the assumption that the claims of all creditors were barred by the decree of September 25, 1877; that the order of May 6, 1879, opened said decree as to said Rowell only, and hence,

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that he was entitled to so much of the newly discovered or fraudulently suppressed assets as would satisfy his claim on his joint and several note against Davis and Jones, after payment of the expenses of this accounting. The referee also found, in substance, that Perry, the assignee, and Rowell, the contestant, were both active and effective conspirators with the assignors in efforts to defraud creditors; and that this was the object of the assignment.

Wm. B. Sutton, for contestant.

D. C. Stoddard, for assignee.

VANN, J.—The object of the assignors in making the general assignment, and of the assignee in accepting it, was to hinder, delay and defraud creditors. The contestant not only knew this at the time, but actively helped the fraudulent scheme along. Creditors, however, have the right to waive the fraud, accept the assignment and come in under it. (*Rapalje* agt. *Stewart*, 27 N. Y., 310; *Mills* agt. *Argall*, 6 Paige, 577). They all seem to have done so in this case and hence it is the duty of the court to enforce the trust upon the application of any one having a valid debt against the assignors. No party to this controversy makes any claim hostile to the assignment, but all claim under and in confirmation of it.

The first question to be decided is whether the assignment covered both the firm and individual property of the assignors, or firm property only. As the contestant is not a firm creditor, he has no standing in court upon this accounting if the assignment covered only firm property, and was for the sole benefit of firm creditors. While, as an individual creditor of two of the assignors, it would be for his interest that any surplus going to them should be as large as possible, he could only reach that surplus by perfecting judgment against his debtors and acquiring a lien upon it as a judgment creditor. Otherwise he would have no interest in it that could be pro-

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tected upon this proceeding, unless the assignors assigned individually as well as copartners.

The practical construction given to the assignment by the assignors and the assignee is of slight importance, as it does not appear from their conduct in creating or administering the trust that they were controlled either by judgment or principle. The powers of the assignee in administering the trust and of the courts in controlling such administration are confined to the express terms of the assignment (*In the Matter of Lewis*, 81 N. Y., 421; *Chapin agt. Thompson*, 89 N. Y., 270, 279). The instrument creating the trust is both the foundation and the boundary of those powers.

If the assignors assigned jointly, or as copartners only, neither the assignee nor the courts can reach the individual property of any one of them in any proceeding under the assignment, or in any attempt to enforce it.

The assignment, when reduced to an outline or framework, is in substance, as follows: "We, D., J., B. & E., all of Utica, comprising the firm of D., J., B. & Co., doing business as manufacturers in Utica, for one dollar to us paid, hereby assign to P., all of our personal and real property not exempt from execution, in trust for our creditors. We direct said trustee to take possession of all our estate and convert the same into cash for our creditors. We direct him, out of the proceeds, to first pay expenses of administration; and, whereas divers persons have each indorsed notes and drafts for our use and benefit and for the benefit and accommodation of our firm, and we have given a mortgage on our stock and goods to P., the first indorser on most of said paper which has been used by us and is now held by parties to us unknown, we therefore direct said trustee to pay all of said paper and bear said indorsers harmless from liability on account of indorsements for our said firm. We direct that said assignee next pay all of our debts in full, reserving to ourselves all moneys that may remain in his hands after payment of all our debts. Witness our hands and seals."

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Thus from the beginning to the end of this instrument it seems to be wholly and exclusively a joint or firm contract. It in effect says: "We, composing a firm, assign our property to pay our debts, reserving any surplus to ourselves." The subject of the assignment was "our property," which includes all and only such as the assignors owned jointly or as partners. The object of the assignment, at least when it is gathered from the instrument itself, was to pay "our debts," or indorsements for "our said firm," which necessarily excludes any but joint or firm debts.

The deed of trust is silent as to individual assets and individual debts. Whether either existed cannot be told from reading it. The description of the assignors, their property and indebtedness, the form of the granting clause, the recitals, the naming of creditors, the directions to the assignee, and the reservation of the surplus, all indicate a joint undertaking. No words of severance appear in the instrument. The joint form of expression is used exclusively. Words with a plural meaning, such as "we," "us" and "our," are constantly used, but no word of separation, with a singular or several meaning. The word "our" does not have a joint and several meaning. That would be expressed by "our and each of our." The assignment must be construed to cover individual property and to provide for the payment of individual debts, before it can be held that the claim of the contestant should be paid. This cannot be done without holding that the word "our" and the expression "our and each of our" are convertible terms.

The intention of the parties, throwing out of view the fraud which all intended to perpetrate upon creditors, and which is a constant embarrassment in any attempt to construe the writing as an honest business undertaking, whether ascertained from the words used, or from the circumstances surrounding the contracting parties, or both, is the same. It appears from the evidence that the firm owned a large and valuable stock of goods, with accounts and other personal

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property, but no real estate. Two of the assignors owned no individual property, and the other two owned none except some real estate of no appreciable value above incumbrances. The firm was largely indebted and probably insolvent. Two of the assignors owed nothing individually, but each of the others owed more than his individual property was worth. It is therefore to be presumed that the object of the assignment was to transfer firm property to pay firm debts. Whatever its form, it could have no other practical effect, as there were no individual assets worth mentioning for it to operate upon. No reason can be found in the circumstances surrounding the assignors when they assigned, for giving a more extended meaning to any term used by them than its ordinary and natural signification.

Moreover the creditors in the first class were to be paid in full from the proceeds of all the property assigned. Did the assignors intend to execute an instrument void upon its face by providing for the application of individual property to the payment of copartnership debts?

I think that the assignment does not cover individual property, nor provide for the payment of individual debts. This construction is supported by the following authorities: *Morrison* agt. *Atwell* (9 *Bosw.*, 503); *Turner* agt. *Jaycox* (40 *Barb.*, 164, 172; *affirmed on appeal*, 40 *N. Y.*, 470, 472); *Collumb* agt. *Collumb* (16 *N. Y.*, 484); *The Berkshire Woolen Co.* agt. *Juillard* (75 *N. Y.*, 535); *Perry on Trusts* (secs. 345, 579 and 641); 1 *Parsons on Contracts* (6th ed., p. 2, and note).

The exemption clause of the assignment and that granting real property are relied upon as supporting the theory that individual property was transferred. This position is not without force, but, as those clauses may have been used from more abundant caution or adopted from the usual form, I think it must yield to the points already suggested which impress me as of greater force.

But even if the construction placed upon the assignment

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by the learned referee is correct, the position of the contestant that he should be paid in full to the exclusion of the firm creditors cannot be allowed to prevail. After so aiding the assignors in their efforts to defraud creditors that unpreferred claims received substantially no dividend, he slept upon his own rights until the claims of all creditors had been barred, including his own, when he procured a dispensation in his favor that would enable him to obtain his pay in full out of assets equitably belonging to others. Under any construction of the assignment this would not be allowed, at least until all creditors had been notified of the changed condition of affairs and had been permitted to move to open the decree and come in upon the second or supplementary accounting. The honest and diligent creditor is favored by the law, but if the result sought for by the contestant in this proceeding is effected, the dishonest and negligent creditor would be favored. He would in effect be allowed to take advantage of his own wrong.

The motion to confirm the report of the referee is denied, with costs, and this proceeding is dismissed but without prejudice to the right of any firm creditor to make such application as he may deem proper for the protection of his rights.

SUPREME COURT.

HALL agt. CONGER.

Order of arrest—Not necessary that a complaint should be submitted to the court or justice as a condition to the granting of order—Code of Civil Procedure, secs. 549, 550, 557.

It is not necessary, as a condition to the granting of an order of arrest, pursuant to subdivision 4 of section 549 of the Code of Civil Procedure, that a complaint should be submitted to the court or justice granting such order, nor that the contents of the complaint should be stated in an affidavit, nor that any complaint should be in existence at the time such order is granted.

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An order of arrest may be granted under subdivision 4 of section 549, upon an affidavit setting forth facts, showing that a cause of action exists against the defendant under that subdivision, but the order must be vacated immediately upon the filing or service of the complaint, if a cause of action under the same subdivision is not therein set forth.

New York Chambers, January, 1885.

MOTION to vacate order of arrest.

ANDREWS, J.—In my opinion it is not necessary, as a condition to the granting an order of arrest, pursuant to subdivision 4 of section 549 of the Code of Civil Procedure, that a complaint should be submitted to the court or justice granting such order, nor that the contents of the complaint should be stated in an affidavit, nor that any complaint should be in existence at the time such order is granted.

Sections 549 and 550 enumerate and define the "cases," that is, the classes of actions in which a defendant may be arrested, but do not attempt to prescribe the papers upon which the order may be made. The latter matter is dealt with in section 557, which provides as follows: The order may be granted in a case specified in section 549 of this act, where it appears, by the affidavit of the plaintiff or any other person, that a sufficient cause of action exists against the defendant, as prescribed in that section.

Where the application is made under subdivision 4 of section 549, the affidavit must show that the action is on contract, express or implied, other than a promise to marry, and that the defendant was guilty of a fraud in contracting or incurring the liability. So far as I can see, there is nothing in section 557, nor elsewhere in the Code, which requires that a complaint should accompany the affidavit, or be referred to in it.

This view is confirmed, if confirmation were necessary, by section 558, where it is provided that the order may be granted to accompany the summons, but that at any time after the filing or service of the complaint, the order must be

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vacated, on motion, if the complaint fails to set forth a sufficient cause of action, as required by section 557. That is to say, an order of arrest may be granted under subdivision 4 of section 549, upon an affidavit setting forth facts, showing that a cause of action exists against the defendant under that subdivision, but the order must be vacated immediately upon the filing or service of the complaint, if a cause of action under the same subdivision is not therein set forth.

Upon the reason of the thing, I do not see that it is of any consequence to the defendant that the complaint should be presented with the affidavit when the order is granted, nor that it should then be in existence. The complaint must set forth facts showing the fraud, and the plaintiff cannot recover unless the fraud is proved upon the trial; and, as above stated, the order must be vacated at once if the complaint, when filed or served, does not contain a complete cause of action under said subdivision 4.

Upon the merits of this case, as the affidavits are conflicting, the issue of fraud cannot be properly disposed of by the judge at chambers upon *ex parte* statements, but must be tried with the other issues in the action.

Motion denied, with ten dollars costs.

SURROGATE'S COURT.

In the Estate of JOHN WHITEHEAD, deceased.

Trustees—Successors to testamentary trustees required to give security—Code of Civil Procedure, sections 2514, 2587, 2685, 2686, 2687, 2715, 2718, 2815, 2816, 2817, 2818.

The surrogate has authority, in appointing successors to testamentary trustees, to require them to give security for the faithful discharge of their duties.

New York county, December, 1884.

In the Estate of John Whitehead, deceased.

ROLLINS, S. — One of the trusts created by this testator's will is still unexecuted, and the trustees whom he selected for its execution are dead. The surrogate is now asked to appoint their successor, and to decide whether such successor should be required to give bonds for the faithful discharge of his duties. If there were any statutory answer to this question one would naturally expect to find it in section 2818 of the Code of Civil Procedure. That section authorizes the surrogate, in the event of the death, lunacy, resignation or removal of a testamentary trustee, to appoint a successor. It provides also that under certain circumstances such successor shall be required to qualify in the same manner as an administrator with the will annexed, and, among other things, to give, like him, security for the proper performance of his trust. But this statutory requirement extends only to cases where the vacancy in the office of trustee has been brought about by resignation or removal, and does not include cases where it has been caused by lunacy or death. I agree, however, with surrogate COFFIN (*see Tompkins* agt. *Moseman*, 5 *Redf.*, 402), that from this circumstance no inference can be justly drawn that the legislature designed to relieve the successors of deceased or insane testamentary trustees from any burdens that it imposes upon the successors of testamentary trustees removed from office or permitted to resign. With the exception that will presently be noted, section 2818, as it stood before the amendment of 1884 (and that amendment has no bearing upon the question now under consideration), was word for word like section 2587 of the Code as originally presented by the commissioners to the legislature. When thus presented it read as follows:

“Where a sole testamentary trustee is, by a decree of the surrogate's court, removed or allowed to resign, and the trust has not been fully executed, the same court may appoint his successor, unless such an appointment would contravene the express terms of the will. Where a decree removing the trustee or discharging him upon his resignation does not

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designate his successor, or the person designated does not qualify, the successor must be appointed and must qualify as prescribed by law for the appointment and qualification of an administrator with the will annexed."

It will be observed that the surrogate's authority to appoint successors to original testamentary trustees was proposed to be limited to cases where such trustees had resigned, or had been removed, and that it was proposed also to require from the successor of every such trustee the security of a bond. The commissioners attached to this section a note declaring that its object was to extend to the surrogates of all counties the authority conferred upon the surrogate of this county by section 3 of chapter 359 of the Laws of 1870, and added these words: "We are not disposed to recommend the extension of the power as to vacancies created by death, insanity, &c."

The section thus reported to the legislature was, before its adoption, so amended in its first clause as to effect the very enlargement of authority that the commissioners deprecated. But, evidently by inadvertence, the corresponding change was not made in the clause relating to qualification.

Under these circumstances, and in the absence of any express direction of statute, it is the surrogate's duty to adopt the practice formerly pursued in such cases by the court of chancery, and more recently by the supreme court in its exercise of equity power (*Tompkins agt. Moseman, supra*).

There are many cases which recognize the propriety and legality of requiring a bond from the successors of testamentary trustees (*See Matter of Robinson*, 37 N. Y., 264; *People agt. Norton*, 9 N. Y., 176; *Milbank agt. Crane*, 25 How. Pr., 193; *In the Matter of Stuyvesant*, 3 Edward's Ch., 316; *Ex parte Jones*, 4 Sandf. Ch., 615).

Counsel for the petitioner opposes this view of the surrogate's duty and authority by reference to section 2815 of the Code. "Any person beneficially interested in the execution of the trust," says that section, "may present to the surrogate's court a petition setting forth * * * any fact

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respecting a testamentary trustee, the existence of which, if it was interposed as an objection to granting letters testamentary to a person named as executor in a will, would make it necessary for such person to give security in order to entitle himself to letters, and praying for a decree directing the testamentary trustee to give security for the performance of his trust, and that he may be cited to show cause why such a decree should not be made. * * * Upon the return of the citation a decree requiring the testamentary trustee to give such security may be made in a case where a person so named as executor can entitle himself to letters testamentary only by giving bond; but not otherwise."

Now it seems to be claimed by petitioner's counsel that only in cases expressly specified in section 2718, already discussed, and in cases covered by section 2715, can a "testamentary trustee" be required by the surrogate to give bonds, and it is insisted that the term "testamentary trustee," as used in the latter section, is not limited in its meaning to trustees appointed by the will of a testator, but includes also any successor to such trustees who may be appointed by the surrogate. In support of the latter contention counsel refers to section 2514, which declares that, with certain exceptions, the expression "testamentary trustees," wherever it is used in the eighteenth chapter of the Code, shall be held to include "every person who is designated by a will or by any competent authority to execute a trust created by a will." The same section, however, provides that such rule of interpretation shall not be observed "where a contrary intent is expressly declared in the provision to be construed or is plainly apparent from the context thereof."

From a careful examination of the context it is, I think, "plainly apparent" that the term testamentary trustee, as used in section 2815, means a trustee named in the will and no other. This is strongly indicated by the close similarity which exists throughout the eighteenth chapter between the provisions that relate to executors and those that relate to tes-

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tamentary trustees. That policy of the law which only under special circumstances permits the exaction of a bond from executors before granting them letters testamentary, would naturally require that similar restrictions be placed upon the surrogate's authority to impose upon testamentary trustees selected by the testator himself the burden of giving security.

That policy, on the other hand, could not be extended to the successors of such trustees with any more propriety than to administrators with the will annexed, which latter class of officers have always been required to give bonds. The Code says, in effect, considering its various provisions as a whole, that persons named as executors in a will are entitled to letters testamentary without giving bond, unless when their right thereto is challenged it appears that they reside out of the State, or that their circumstances do not afford adequate security for their due administration of the estate (*Secs. 2685, 2686, 2687*). And it substantially says, also, that persons named as trustees in a will are entitled to exercise the functions of their office without security, subject only to the same limitations that are established in the case of executors (*Secs. 2815, 2816, 2817*).

As to the successors of such trustees, however, I am convinced that the surrogate may, in all cases, lawfully require security at the time of their appointment. It must be furnished in the case at bar.

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SUPREME COURT.

ROBERT F. LITTLE, as receiver, respondent, agt. THERESA
LYNCH, appellant.

Code of Civil Procedure, section 1019 — Rights of referees — What is a sufficient compliance with the provisions of section 1019, as to delivery of report, to prevent the forfeiture of fees or termination of reference.

A referee is not bound to part with his report without the payment of his legal fees; and where a referee has his report ready within the statutory time, and offers to deliver it on payment of his legal fees, the same is a sufficient delivery, pursuant to section 1019 of the Code of Civil Procedure, to prevent the statute from operating as a forfeiture of his fees and a termination of the reference (*Reversing S. C., 67 How., 1; Thornton agt. Thornton, 66 How., 119, approved*).

First Department, General Term, January, 1885.

Before DAVIS, P. J., BRADY and DANIELS, JJ.

APPEAL from an order vacating and setting aside a judgment in favor of the defendant, and the report of the referee upon which the same was entered.

Abram Kling, for appellant.

W. T. B. Milliken, for respondent.

BRADY, J. — This motion appears to have been made and granted upon the ground that the reference had been terminated before the filing of the report of the referee. It appears that the order of reference was entered upon the 5th of April, 1881, and that the referee, upon the eighteenth of May following, made his final report in favor of the defendant dismissing the plaintiff's complaint, and offered to deliver it to the defendant's attorney and said that he could have the same upon the payment of his fees. All of which was done within sixty days from the time of making the same, but the fees were not paid by the attorney.

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A similar application to this was denied by the supreme court of the second district (*Waters agt. Shepherd*, 14 *Hun*, 223). In that case it appeared the referee made his report within the time limited by the statute, and on the same day gave notice to the attorneys for the plaintiff and the defendant that the report was ready for delivery. The report was not taken up, however, until after the expiration of sixty days, when the defendant served a notice in writing upon the referee and the plaintiff's attorney that she elected to end the reference. The plaintiff's attorney, however, took the report from the referee and entered judgment upon it. The special term ordered the judgment to stand as having been regularly entered. The general term affirmed the order. It was held to be sufficient to comply with the terms of the statute that the report was made and the parties notified of its terms, and that it could be obtained on application to the referee. That decision rested upon section 273 of the Code, then in force, which required the referee to make and deliver his report within sixty days from the time the action was finally submitted. The decision was made in May, 1878.

In December, 1880, the same department decided a similar question (*Phipps agt. Carman*, 23 *Hun*, 150), holding, however, that the binding force of *Waters agt. Shepherd* was destroyed by the Code, as altered since the decision therein was made, and the judgment of the court seems to have rested upon the change which was made by section 1019 of the Code of Civil Procedure, to the effect that the report may be delivered to the attorney for one of the parties, or filed with the clerk within sixty days; and they declared that the referee would not have done his duty under the section, unless he delivered his report to the clerk to be filed in case it was not taken up by one of the attorneys within the sixty days. That case was taken to the court of appeals and decided on the 11th of February, 1881. It was affirmed without any opinion, but upon the concurrence of all the judges.

In the January preceding, however, the general term of

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this court in the third department, in the case of *Cornelius agt. Barton* (12 *N. Y. Weekly Dig.*, 216), held that where the referee had made his report and was ready to deliver it in the statutory time, but held it for the payment of his fees, there was a sufficient delivery to prevent the forfeiture of his fees on the termination of the reference under section 1019 of the Code. In that case it appeared that within a very few days after the cause was submitted the referee notified the plaintiff's attorney that the report was in readiness to be delivered on the receipt of his fees. The court seems to have rested its judgment in that case upon the decision in *Geib agt. Topping* (83 *N. Y.*, 46) in the court of appeals. Subsequently the case of *Thornton agt. Thornton* (66 *How. Pr. R.*, 119) was decided at special term, namely, in August, 1883, and it was held that where the referee makes his report within the statutory time and notifies the attorneys that his report is ready and at their disposal, and also of the amount of his fees, it should be deemed a sufficient delivery to prevent the forfeiture of his fees by the termination of the reference, under section 1019 of the Code of Civil Procedure. Justice HAIGHT, in delivering the opinion, said he was aware the decision of *Phipps agt. Carman* (*supra*) was in conflict with the conclusions at which he had arrived, and that the case had been affirmed in 84 *New York*, but stated that he was unable to concur in the opinion written in general term, and it seems for the reason that the general term of another department had held the other way, doubtless referring to the case of *Cornelius agt. Barton* (*supra*). The learned justice also said that the court of appeals, it was true, affirmed the decision in *Phipps agt. Carman*, but did not state the grounds upon which the decision was based; that there was a delay of two years in that case in filing the referee's report, and the case was distinguishable from the one under consideration by him.

The supreme court, in the second department, seems to have overlooked the provision authorizing the delivery of the report as an act which would prevent the operation of the

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statute, and destroy the right of parties to terminate the reference by giving the notice provided for, and to have held that the referee, if the report was not actually delivered to one of the parties, must file it in the clerk's office. It is quite apparent, from the reading of the statute, that it is complied with if he does deliver the report as one of the alternates declared, and if the notification under section 273 of the old Code that the report was made and ready for delivery was a delivery within the terms of that statute, it certainly is within the terms of section 1019 of the present Code. The filing then is not necessary, for the first alternate is accomplished. This view was not, it would seem, considered by the court of appeals upon the submission of *Phipps agt Carman*, because no opinion was delivered.

I think, therefore, in accordance with several cases, some of which are cited by justice HAIGHT in his opinion in the case of *Thornton agt. Thornton (supra)*, that the report was constructively delivered by the referee in this case prior to the expiration of the sixty days and under the statute, and that the requirements of section 1019 of the Code of Civil Procedure were complied with.

The order appealed from should be reversed.

DANIELS, J. — The order was made upon the ground that the referee had failed to make and deliver his report within the time prescribed for that purpose by the Code, and that notice had been given on the part of the plaintiff's terminating the reference. But it was made to appear that the report of the referee was subscribed and ready to be delivered before the expiration of the sixty days mentioned in section 1019 of the Code of Civil Procedure, and that it was offered to be delivered to the defendant's attorney upon the payment of the fees of the referee. Such an offer was considered to be equivalent to an actual delivery of the report under section 273 of the Code of Procedure. That provided, as the present Code in effect does, that the referee should make and deliver

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the report within sixty days from the time the action should be finally submitted, and in default thereof, and before the report should be delivered, either party could serve notice upon the other that he elected to end the reference. Under that language it was held, in *Waters agt. Shepherd* (14 Hun, 223), to be sufficient to prevent the reference from being avoided or the report annulled, that it should be offered to be delivered within the sixty days, as this report was, to the attorney of one of the parties, upon the payment of the fees of the referee. And that was regarded as an accurate construction of this provision of the Code, as it was repeated in this section of the Code of Civil Procedure, in *Geib agt. Topping* (83 N. Y., 46), where it was said that "the referee undoubtedly was not bound to part with the report without payment of his legal fees, and where a referee has his report ready within the statutory time and offers to deliver it on payment of his legal fees, such offer should, we think, be deemed a sufficient delivery to prevent the forfeiture of fees declared by section 1019 of the Code of Civil Procedure (*Id.*, 48).

It has been supposed, inasmuch as the legislature, by the enactment of section 1019 of the Code of Civil Procedure, authorized the report of the referee to be filed with the clerk within sixty days, that this additional liberty prevented the other provision from being complied with by such an offer as was made in this case, and was sanctioned by the authorities already mentioned. This was held in *Phipps agt. Carman* (23 Hun, 150), which was affirmed by the court of appeals (84 N. Y., 650). But that affirmance, as was stated by Mr. justice HAIGHT in *Thornton agt. Thornton* (66 How., 119), may very well have proceeded upon the great delay appearing to have taken place before the referee's report was filed. There certainly was no good reason for holding that the language, standing by itself, which would permit a compliance with what it required to be done by an offer of the report upon the payment of the fees of the referee, should be deprived of its

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effect by the additional liberty given to file it with the clerk. That was not the form in which the section was enacted, but it declared that either might be done to maintain the force and effect of the report. It might, within the sixty days, "be either filed with the clerk or delivered to the attorney for one of the parties." The referee accordingly had his election to do one or the other of these acts, and either would comply with what the legislature has required. If he filed it with the clerk, that would be sufficient. If he did not do that, then a delivery to the attorney for one of the parties would secure the preservation and validity of the report. And no more was required to make this delivery to the attorney for one of the parties than had been when the same provision formed a part of the Code of Civil Procedure. Consequently what would have been a delivery of the report to an attorney for one of the parties under the Code of Procedure, would be equally as complete a delivery of it under this section of the Code of Civil Procedure. And so it was considered in *Geib agt. Topping* (*supra*). The same point arose in *Cornelius agt. Barton* (12 *N. Y. Weekly Dig.*, 216), where this construction of the section was sustained by the court. Certainly, as the enactment is precisely the same concerning the delivery of the report to the attorney in the Code of Civil Procedure as it was in the Code of Procedure, what would constitute a compliance with the latter should be held to be equally as effectual under the former. For the additional privilege secured to the referee of filing his report with the clerk in no manner tended to indicate what might be necessary to constitute a delivery to the attorney. Each proceeding was separate and distinct. What was a good delivery under the same language employed in the Code of Procedure must necessarily be equally as good under the like phraseology in the Code of Civil Procedure.

The order should be reversed with the usual costs and disbursements, and an order entered denying the motion.

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COUNTY COURT.

JOSEPH DOTY agt. CHARLES CAMPBELL, appellant.

False representations—When action founded upon fraud and deceit of defendant cannot be maintained—Justices' courts—Discretion of justice as to allowing amendments—When improperly exercised.

An action founded upon fraud and deceit of defendant cannot be maintained in the absence of proof that the defendant believed, or had reason to believe, at the time he made them, that the representations made by him were false, and for that reason fraudulently made, or unless it be shown that he assumed, or intended to convey the impression, that he had actual knowledge of their truth, though conscious that he had no such knowledge.

In an action in a justice's court, during the progress of the trial and while the plaintiff was examining one of his witnesses, the defendant appeared before the justice by his attorney and asked to be permitted to answer and disprove the case as made by the plaintiff. The justice denied the request :

Held, error; the discretion that is given to a court is a "judicial discretion," which must be exercised according to legal and just rules. It cannot be an arbitrary discretion to be exercised as the court shall arbitrarily decide, overriding the natural rights of a suitor and depriving one of his means of fairly meeting a claim urged against him.

Allegany county, October, 1884.

Curtiss, Murphy & Bernkopf, for appellant.

L. E. Cheeseman, for respondent.

FARNUM, C. J.—This action was commenced in a justice's court to recover damages of the defendant on account of fraudulent statements and representations alleged to have been made by the defendant to the plaintiff to induce, and which did induce him and another to sell the defendant certain personal property and take in exchange therefor the promissory note of Enos Emerson.

The substance of the alleged statements made by the defendant are set forth in the complaint, as follows : "The defendant, stated and represented that Enos Emerson, the maker of said

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note, was solvent and responsible and had a farm worth six thousand dollars, and that the note could be collected from him."

The plaintiff to establish his case upon this branch of it, testified: "I asked him, the defendant, if he knew anything about the responsibility of the maker (of the note); I did not know Enos Emerson at the time; he said he owned a farm in Bolivar for which he had paid \$5,000 or \$6,000 in cash, and that he was perfectly responsible; he said he was good and the note was perfectly good by reason of his owning the farm; Enos Emerson did not have a farm worth \$5,000 or \$6,000, in Bolivar, at that time."

The plaintiff also called Fred R. Doty as a witness, who testified: "Campbell stated that Emerson had lately purchased and then owned a farm in the town of Bolivar, N. Y., for which he had paid \$5,000 or \$6,000, in cash, and that Mr. Emerson was perfectly responsible for the amount of the note, and for that matter for the value of all the wagons we had, and that the note would be paid at maturity."

Enos Emerson was then sworn as a witness for the plaintiff, and had testified that on April 5, 1883 (the date of the alleged representation by defendant), he was and ever since had been insolvent, when James M. Curtiss, an attorney of Bolivar, N. Y., appeared in court before the justice and asked to interpose and offered an answer in writing, which offer was refused by the justice. The answer so offered was filed by the justice, and upon appeal returned with the proper process and proceedings had before him. The answer contained a general denial that Emerson was solvent and able to pay all his debts; that Emerson confessed a judgment upon the note in question before a justice of the peace on the 6th day of ———, 1884, for \$216.65. The witness Emerson then continued with his testimony, and stated "April 20, 1883, I did not own a farm worth \$5,000 or \$6000 in the town of Bolivar.

I have recited all the testimony given upon the trial bearing upon the statement of the defendant, and its falsity. Taking

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all the testimony as most favorable to the plaintiff, it appears that the defendant stated Emerson had a farm in Bolivar for which *he had paid* \$5,000 or \$6,000; that the note was good, by reason of Emerson owning the farm, and that Emerson was solvent and responsible.

There is no proof to correspond with the allegation of the complaint, that the defendant represented that Emerson had a farm *worth* \$5,000 or \$6,000, and there is no proof but that the representation of the defendant was true, that Emerson *had paid* \$5,000 or \$6,000 for it, so that all the representation the plaintiff can rely upon to maintain his action is, that the defendant stated Emerson was solvent and responsible. Is this such a representation, that if false, the plaintiff will be entitled to recover? There is no direct evidence that the defendant knew this statement to be untrue. Then is it established that the defendant assumed or intended to convey the impression that he had actual knowledge of the solvency of Emerson, though conscious that he had no such knowledge.

Taking the statement as a whole, there being no evidence but that Emerson had paid \$5,000 or \$6,000 for the farm in Bolivar, can it be said that the addition that Emerson was solvent and responsible was more than the expression of an opinion based upon the fact that Emerson had paid \$5,000 or \$6,000 for the farm.

The respondent has cited numerous authorities contending that they are in point and sustain this judgment. In *Bishop agt. Davis* (9 Hun, 342), stress is laid upon the point that the representations in that case were minute, positive, unconditional and unequivocal, and were such that from their very nature, the defendant assumed to have knowledge upon the subject of which he spoke. The authorities bearing upon this question are collated in *Indianapolis P. & C. R. R. Co. agt. Tyng* (2 Hun, 311), and at page 321 the court say: "It is quite apparent from the facts established, that the defendant, if he did not know of the falsity of the statements made, at least assumed, or intended to convey the impression that he had

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actual knowledge of the truth of the representations as to the condition of the engines, though conscious that he had not ;” and in that case the court in speaking of actions for deceit resting on representations of insolvency say (*page 321*): “It may be assumed, that when information of that kind is sought, it must necessarily partake of the character of information only and not of knowledge, unless by some special and particular phrase it is intended to be otherwise.”

Viewing the statement of the defendant that Emerson was solvent and responsible, in the light of all that was said, I cannot spell from it that it was more than the expression of an opinion based on the prior statement, and I fail to see where he assumed to speak from knowledge, or where the plaintiff had a right to infer that he did.

Marsh agt. Falken (40 *N. Y.*, 562) was brought to recover damages upon the statement made by the defendant that one “Kahn was perfectly good — good for \$17,000 or \$18,000 in property in Syracuse, and if I (plaintiff) took Kahn’s note he (defendant) would discount it.”

In delivering the opinion of the court, justice DANIELS said (*page 567*): “In order to determine whether material representations of actual knowledge of the existence of material facts be deceitfully or fraudulently made, or whether that may be properly and fairly inferred, regard must be had to the transaction in which they are made, and to the subject to which they relate ; for, as to many subjects of trade and traffic, the acquisition of such knowledge is common, and, therefore, when imputed by the representations made, it may be reasonably expected to have been intended that the person to whom they may be made should understand that to be their character. As to many other things the possession of actual knowledge is exceedingly rare and exceptional, and when representations are made concerning them, they are usually understood as amounting to no more than the candid and sincere conviction of the person making them. They are expressions of opinion or judgment, rather than absolute

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representations of fact, and as such are not necessarily fraudulent, though they afterwards turn out to be wholly unfounded and untrue." "The representations relied upon for a recovery in this case related to a matter that could not ordinarily be expected to be within the knowledge of the person making them. There is nothing in the case in any way indicating that the plaintiff had any reason for supposing that the defendant possessed any other knowledge upon the subject concerning which he was applied to for information, than that which one person in business will commonly acquire concerning others in the same business, residing in the same place." At pages 573 and 574, justice GROVER said: "The plaintiff was entitled to recover, so far as the point under consideration is concerned, if the defendant is to be understood as speaking of his own personal knowledge of the affairs of Kahn in making the statement." "Notwithstanding the positive form of the reply, I think that the fair presumption is that the defendant intended only to express his firm belief and confident opinion, that such was the pecuniary situation of Kahn; and that he would be so understood, not only by business men in general, but that he was in fact so understood by the plaintiff."

I have quoted liberally from the opinion written in the *Marsh case*, for the justices here fully met the argument made in this case by the respondent, and their reasoning is unanswerable. Upon the merits of the case the plaintiff herein must fail upon all the evidence in the case. But on another branch of the case the judgments should be reversed. During the progress of the trial and while the plaintiff was examining one of his witnesses, the defendant appeared before the justice, by his attorney, and asked to be permitted to answer and disprove the case as made by the plaintiff. The justice denied this request. The respondent now insists that this was a matter of discretion with the justice, and cannot be reviewed here. If it were a matter of discretion then, of course, the decision of that question ought not to be considered upon this appeal.

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The respondent cites *Jenkins* agt. *Bowen* (21 *Wend.*, 454); *Montford* agt. *Hughes* (3 *E. D. Smith*, 591); *Mead* agt. *Danogh* (1 *Hilt.*, 395) and *Sammis* agt. *Brice* (4 *Denio*, 576), as authority supporting the action of the justice. In the cases cited from 3 *E. D. Smith*, 21 *Wendell*, and 4 *Denio*, the defendant failed to appear upon the return day, and upon the adjourned day appeared and offered to plead. In the case in 1 *Hilton*, upon the return day, after the cause was adjourned and the plaintiff had left the room, the defendant appeared and answered. Each of these cases differs from the one under consideration and do not control this. Here the summons was returnable at one o'clock. The justice returns that he waited a full hour before proceeding with the cause, and further certifies that at half-past two o'clock, or within half an hour from the time commenced the trial of the cause, and it seems while all of plaintiff's witnesses were in the court-room the defendant appeared by counsel and asked to be permitted to answer. This request was denied. Had it been apparent that the answer was not interposed in good faith, and that it was offered for delay, then it might well be said that the justice properly exercised his discretion..

The discretion that is given to a court is a "judicial discretion," which must be exercised according to legal and just rules; it cannot be an arbitrary discretion to be exercised as the court shall arbitrarily decide, overriding the natural rights of a suitor and depriving one of his means of fairly meeting a claim urged against him. The mere statement of the case strikes one as a harsh and unjust ruling. It is not suggested in what way the plaintiff could have been injured or wronged by permitting the defendant to make any legal defense he had. It is possible that the answer might make it necessary for the plaintiff to adjourn the trial, if so, the court had full power to grant an adjournment upon such terms as should be just to all, but this is no ground for denying the defendant the right to make the best defense he had.

In *Ryan* agt. *Lewis* (3 *Hun*, 429), justice MULLIN used

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this language: "But, assuming that the allowance of an amendment rests in the discretion of the court, yet the refusal in this case was a gross abuse of the discretion, and the only remedy of the party is by appeal. A judicial officer who should refuse leave to a party to amend, when it is apparent that the application is made in good faith, and is absolutely necessary for the protection of his rights, ought to be indicted or removed from his office." It is very pointed, yet it may with great propriety be quoted in this case (*See, also, Walsh agt. Comett, 17 Hun, 27, and Wood agt. Skullis, 4 Hun, 309*).

There are several other matters urged as error, but in the view above taken of the case it is unnecessary to consider them.

The judgment must be reversed.

SUPREME COURT.

N. W. HOOKER agt. H. D. TOWNSEND.

Sureties on appeal—Code of Procedure, sections 334, 338—Liability of sureties on undertakings on appeal—Two separate undertakings admissible—Code of Civil Procedure, section 1335.

After two sureties, A. and B., had executed a joint and several undertaking under sections 334 and 338 of the old Code for a stay of proceedings on appeal, A. justified, but when subsequently B. was examined, the justice before whom the examination took place filed a memorandum that he was not qualified, and that defendant in that action must produce another surety. Meantime, intermediate the filing of the memorandum and the entry of an order thereon, the defendant executed the undertakings upon which this action was brought, which were approved:

Held, that by the memorandum and order referred to, the justice approved of A. as one of the sureties upon the undertakings; that it was not necessary that A. should join in the execution of the undertakings with defendant, and even if A. is not liable upon his undertaking, for want of a formal indorsement of approval upon it, the defendant should not be relieved from liability on his undertakings, which stayed plaintiff's proceedings.

New York Circuit, February, 1884.

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Townsend Wandell and Edward S. Clinch, for plaintiff.

George C. Coffin and Robert S. Green, for defendant.

LAWRENCE, J.—The order of July 17, 1875, provided for a stay of proceedings on the appellant's giving undertakings in compliance with sections 334 and 338 of the old Code of Procedure. On the 11th of August, 1875, undertakings were executed in each of the actions by Howard A. Martin and Runyon W. Martin, which undertakings were filed on the 14th of August, 1875. These undertakings were joint and not joint and several. On the 6th of September, 1875, an order was made dismissing the justification of the sureties, and reciting as a ground therefor that the said sureties had failed to appear. The order also recited that the justification had previously been adjourned by stipulation, after the examination of one of said sureties. On the 7th of September, 1875, an order was made requiring the plaintiff to show cause why the order made dismissing the justification of the sureties should not be vacated, and the said sureties allowed to justify, &c., and staying plaintiff's proceedings in the meantime, and until the further order of the court. This order was obtained upon an affidavit made by James B. Kisseck which stated that on the second day of September, pursuant to notice and adjournment, Runyon W. Martin, one of the sureties, justified, and that on account of the illness of Howard A. Martin, the other surety, the further examination was adjourned until the fourth instant; that on that day the plaintiff's attorney would not adjourn said examination until longer than the sixth instant; that by reason of the negligence and oversight of a messenger, notice to that effect did not reach the surety, and that on that day, no one appearing to oppose, the plaintiff's attorney obtained and entered an order dismissing the justification of the sureties, although one surety had already justified. Howard A. Martin was subsequently examined, and on the fourteenth of September Mr. justice BRADY, before whom the examination had taken place,

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filed a memorandum, which was published in the Daily Register of September fifteen, as follows: "Howard A. Martin is not qualified as a surety. The defendant must produce another, and serve notice of justification within five days from the entry of the order. Justification to be on two days' notice." No order seems to have been entered upon this decision of Mr. justice BRADY, until the 24th of September, 1875. That order, in substance, recites the decision of the fourteenth of September, and directs the defendant to furnish another surety to the undertakings required in these actions, and to serve notice of justification and to justify within the time specified in said order, and that in default the stay of proceedings be vacated and removed, &c. It is quite clear to me that by the memorandum aforesaid, and his order of September twenty-four, Mr. justice BRADY accepted and approved of Runyon W. Martin as one of the sureties upon the undertakings directed to be given by the order of July 17, 1875. In the meantime, intermediate the filing of the memorandum of Mr. justice BRADY and the entry of the order thereon on the 24th of September, 1875, the defendant, on the 16th of September, 1875, executed and acknowledged the undertakings upon which these actions are brought. His examination was taken on the seventeenth of September, and pinned to the two undertakings, each of which had indorsed thereon these words: "The within undertaking is hereby approved as to its form and the sufficiency of its sureties. Dated 22d September, 1875." Only the approval on the outside paper is signed by justice DONOHUE, but I cannot accede to the proposition that as the examination taken before the notary public is pinned to both of the undertakings, and as the three papers were treated as one, that the omission of the justice to indorse the inner undertaking is to be regarded as an indication that he had disapproved thereof. On the contrary, I am of the opinion that the indorsement of the justice is to be regarded as an approval of both the undertakings, it being quite evident that on the submission of the

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undertakings and examination the three papers were regarded as one.

I think, therefore, that it is too late for the defendant to object that he never became bound by the undertakings in question. In this connection it should be borne in mind that under section 340 of the old Code of Procedure, the undertakings prescribed by sections 334, 335, 336 and 368 might have been in one instrument or several at the option of the appellant, and it was not necessary, therefore, that Runyon W. Martin should join in the execution of the undertaking with the defendant. In *Gottwald agt. Tuttle* (7 *Daly*, 104), the general term of the court of common pleas held that under this section, where an undertaking by two sureties fails of approval, because one of the sureties is insufficient, if afterwards a separate undertaking is executed by another surety alone, he is bound, although the former undertaking, by reason of having failed of approval, has become void. Even if, therefore, Runyon W. Martin, notwithstanding the decision of Mr. justice BRADY, is not liable upon the undertaking executed by him, for the reason that it does not appear that there was a formal indorsement of approval upon Martin's undertaking, I do not see why the defendant should be relieved from liability on undertakings which have received, as we have seen, the approval of the court (*See Ward agt. Whitney*, 3 *Sand.*, 399; *Shaw agt. Tobias*, 3 *Comst.*, 188; *Gottwald agt. Tuttle*, 7 *Daly*, 105).

I shall not undertake to consider in this case whether the defendant, under Rule 8 (*now Rule 5*) of this court, was precluded from becoming a surety on these undertakings, for the reason that, if I am correct in my understanding of the facts, that question was passed upon by the court on the approval of the undertaking, and the defendant is therefore estopped from questioning his liability (*See Genould agt. Wilson*, 81 *N. Y.*, 578).

The case of *Manning agt. Gould* (99 *N. Y.*, 476) does not seem to me to be in point, for the reason that it was given

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under section 1335 of the new Code, which declares that "if the judge finds the sureties sufficient, he must indorse his allowance of them upon the undertaking, or a copy thereof, and a notice of the allowance must be served on the attorney for the exceptant. The effect of a failure so to justify and to procure an allowance is the same as if the undertaking had not been given." In this case, if I am right, the surety, Runyon W. Martin, appeared and justified, and was approved of by judge BRADY, and the defendant appeared, justified and was approved of by justice DONOHUE.

The case of *Post agt. Doremus* (50 *N. Y.*, 371) seems to have rested upon the ground that an actual stay of proceedings by the respondent's attorneys, under a supposition that an insufficient undertaking was legally sufficient, did not constitute a consideration for the undertaking, and that as the appeal was from an order, the provision in the undertaking that "if the judgment as appealed from, &c.," was affirmed, &c., the appellant would pay "the amount directed to be paid by the said judgment," did not cover the affirmance of an order, nor the amount directed to be paid thereby. The criticism was further made in that case, that as the order appealed from named no amount, there was nothing in the order by which the liability of the surety could be measured. I do not regard that case, therefore, as laying down any rule which obliges me to hold that the defendant is exempt from liability upon undertakings into which he has voluntarily entered, and on the faith of which the plaintiffs in this action acted in staying proceedings. As to the case of *Gross agt. Bouton* (9 *Daly*, 25), it is sufficient to say that I do not consider it as overruling the well considered decision of the same court in *Gottwald agt. Tuttle* (7 *Daly*, 105).

Since the above was written my attention has been called to the opinion of the general term of this department in the case of *Grimwood agt. Wilson* (66 *How.*, 283). After perusing that opinion I see no reason for departing from the conclusion at which I have arrived. There is a great difference

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between the two cases. In *Grimwold's case* the surety executed the undertaking with the express understanding that it was to be executed also by another surety. Here there was no such understanding or arrangement, and there were also two sureties, to wit: Martin, who had been approved of by Mr. justice BRADY, and the defendant; and, as we have seen, it was held under the old Code that there might be two separate undertakings (*See 7 Daly, 107, supra*).

The defendant, I must hold from the evidence, clearly knew the character of the instruments which he was executing. They operated in fact as a stay upon the plaintiff's proceedings, and unless the cases cited in this opinion are to be considered as reversed, he is legally bound to perform the obligation assumed by him.

There must be judgment for the plaintiff for amount claimed.

NOTE—The following briefs by counsel in above cases, discussing fully as they do important questions in respect to undertakings on appeal, etc., are deemed worthy of insertion.—ED.

George C. Coffin and Robert S. Green, for defendant:

FIRST, STATEMENT OF FACTS.

Stated in their chronological order the facts material to the argument are as follows:

May 17, 1875, two judgments of foreclosure and sale in two actions were recovered by the plaintiff here against one William R. Martin and another. From these judgments the defendants (*Martin et al.*) appealed to the general term. Pending the appeals the appellants desired a stay of proceedings. This not being a matter of right they applied at special term chambers,

The first order material to the case was made July 17, 1875, which granted a stay conditionally, that is to say: *Ordered*, that on the appellants

(1.) Executing and filing a written undertaking, with two sufficient sureties in each action.

(2.) In the usual form, according to sections 334 and 338 old Code.

(3.) Providing especially for deficiency to the amount of \$7,500 in each action.

(4.) To be accompanied with affidavit required by section 341.

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(5.) And filed. entered and served within ten days.

(8.) Sureties to justify on five days' notice, then all proceedings to be stayed.

This order is the foundation of the proceedings taken by the appellants in order to procure a stay. They attempted to comply with the conditions imposed, and to that end on

August 14, 1875, filed two undertakings in two appeals. These were joint, executed by Howard A. and Runyon W. Martin as sureties.

August 15, 1875, both sureties were excepted to. An attempt was made to have them justify, and

September 2, 1875, Runyon W. Martin was examined; Howard A. did not appear, and on

September 6, 1875, an order was made and entered dismissing the justification as to both sureties.

September 7, 1875, an order was made requiring the respondent to show cause why the order dismissing the justification should not be vacated and the sureties allowed to justify. It seems that on

September 10, 1875, Howard A. was examined, but Runyon was not re-examined nor did he re-justify, though the order of September 6, 1875, was an absolute dismissal as to both.

September 12, 1875.—A decision was made by judge BRADY, and indorsed on the papers, that "Howard A. Martin is not qualified."

September 17, 1875.—The defendant Townsend executed the separate undertakings sued on.

September 18, 1875.—He was examined.

September 22, 1875.—Approval was indorsed by judge DOXONUE on one undertaking only.

September 24, 1875.—An order was entered adjudging Howard A. insufficient, directing that the appellants furnish another surety to the undertakings required, that such surety justify and that on default thereof any and all stay removed as if no undertaking had been given.

The foregoing comprise the entire record so far as material to this issue.

II. Further facts. (1.) The undertakings given by the two Martins were never approved. No indorsement of approval appears on either. (2.) The examination of Runyon W. Martin was never completed. (See adjournments noted at the foot of page after his signature on attempted justification.) (3.) Howard A. was absolutely rejected. No express approval of Runyon W. anywhere appears on the papers. (4.) Defendant Townsend's undertaking in action No. 2, was never indorsed "approved." (5.) After rejection of Howard A. Martin no new undertaking was executed by Runyon W. The plaintiff feeling the necessity for his argument of an approval by the judge of Runyon W. Martin as a surety, in order to connect it with Townsend's undertakings and thus make two sureties, adroitly edged in an oral statement by Mr. Wandell,

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that said Martin had been accepted by the court as a surety. This does not appear upon the record, and indeed the dismissal of the justification contradicts it, nor can such a fact be proved *aliunde* or by parol. The record speaks for itself and shows that he was not approved. (6.) There was in reality but one surety, the defendant here, and the conditions which were *pre-requisite* to a stay were never complied with. (7.) There is no order granting any stay pending the appeals except that of July 17, 1875, which cannot be relied on by plaintiff because its conditions were not complied with. (8.) The undertakings sued on show on their face that they do not comply with section 338 of the old Code nor with the provisions of the order of July 17, 1875, to wit, there was one surety instead of two, and there is no provision against waste nor for the value of the use and occupation. The distinction must be noticed between an undertaking under section 338, which cannot be given without an order and which depends upon the order, and an undertaking under 334 which provides fully for it without an order. (9.) It cannot be implied in this case that there was any understanding, consent or agreement between the parties by which this undertaking was to be accepted, or upon reliance on which the plaintiff has acted to his prejudice so as to infer that the defects or irregularities in the undertaking were waived. Mr. Wandell, in answer to judge GREEN, expressly testifies that there was no such agreement between the parties. (10.) The undertaking does not recite that it is given to procure a stay, and it is not claimed by the plaintiff that it is given pursuant to the statute. Therefore no estoppel can be claimed.

III. The case of *Manning agt. Gould* (90 N. Y., 476, 481), held: "The only object and purpose of the undertaking was to stay the execution of the judgment until the appeal had been heard and determined. The respondent cannot have the *dual right* to enforce the judgment pending the appeal as if no undertaking had been given and at the same time treat it as valid security for the payment of the judgment." And further that unless the sureties justify and are approved, and such approval indorsed on the undertakings, the proceedings are not stayed. In *Post agt. Doremus* (60 N. Y., 371), held, that unless the undertaking effects the object intended, to wit, a stay of proceedings, it is without consideration and void; and further, that in order to create an effectual stay the undertaking must be given pursuant to the requirements of some statute or order granting and directing a stay, or there must be a valid agreement between the parties for a stay. These recent cases in the court of last resort must be held as overruling all earlier cases inconsistent with them. They establish the following rules applicable to this case: 1. Unless the undertaking effects the object intended, to wit, a stay, it is without consideration and void. 2. The stay must be created pursuant to order, statute or agreement, and must be effectual. As matter of fact there was no stay of plaintiff's proceedings pending the appeals. The order of July 17, 1875, was, so to

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speaking, executory; it was to begin and to take effect in the future, and its operative force depended solely upon compliance with its conditions. What prevented plaintiff, Hooker, at any time after July seventeenth, from insisting upon the sale of the premises? He had full liberty to say, you have not complied with the order; you have not fulfilled the contract, and I will proceed, and nothing could have stopped him. The defects were numerous. 1st. The undertakings did not provide against waste, nor for use and occupation, two exceedingly important provisions going to the very core of the matter — which section 338 of the old Code said must be given in order to a stay. In *Halsey agt. Flint* (15 Abb. 367); *Watt agt. Watt* (*Id.*, note); *Smith agt. Heermance* (18 How., 261), held that these provisions must be complied with (*Warring agt. Ayres* 12 Abb., 112). What consideration passed to the plaintiff for a waiver of these essential terms? 2d. The order provided for two sufficient sureties — there was in reality but one. The first undertakings were those of the two Martins, Howard A. and Runyon W. Both were required to justify. On September second Runyon W. was examined. The record (see the examination) shows that further examination was adjourned. Runyon W.'s was never completed. On September sixth an absolute order was made dismissing the justification as to both. It was never reopened. Runyon W. never was again examined and signed no new undertaking. An order to show cause was made on September seventh, but neither that nor the order of September twenty-fourth set aside the absolute dismissal as to Runyon W. Then, on September tenth, Howard A. was examined and adjudged insufficient. Clearly his liability was discharged. Was not Runyon W. also discharged? It seems to defendant's counsel that he was, because the undertaking was joint and not several. Suppose Runyon W. Martin had been sued, and his liability upon the instruments signed by him at issue directly, can there be any doubt that this court would dismiss the complaint as to him? If this question be answered in the affirmative there can be but one result, one conclusion. Under *Manning agt. Gould* and *Post agt. Doremus* the complaint must be dismissed as to Townsend. It hardly seems worth while to argue the proposition that upon an ordinary instrument executed by two or more persons without words of severalty their liability is joint. But against such a construction here is urged section 340 of the old Code, providing that the undertakings may be in one instrument or several, and therefore though there be but one instrument, the contract is several as well as joint. Such a construction, it is true, seems to have been held in *Gottwald agt. Tuttle* (7 Daly, 107), but in *Gross agt. Boulton* (9 Daly, 25) the general term rendering the decision held precisely the opposite. It does not appear from the report (7 Daly, 107) that the original undertaking by Clapp & Barretta was not a joint and several undertaking. In *Wood agt. Fisk* (63 N. Y., 245) it was held that the liability of sureties was not enlarged by section 340. This case has

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been followed, *Davis* agt. *Van Buren* (73 N. Y., 587), *Randall* agt. *Suckett* (77 *id.*, 480), holding that such undertakings are joint and that upon the death of one his estate is discharged. Plaintiff's counsel is assumed to know the law, and he must have been well aware of the effect of Howard A.'s failure to justify. He must have known that such failure let Runyon W. out, and that there was then no surety whatever liable on the undertakings. But there still remains another and most serious defect, viz., there was never any approval of Runyon W. Martin as a surety. This brings the case directly within *Manning* agt. *Gould*, unless the new Code in the respect of justification and approval differs from the old. Judge TRACY, in his opinion in this case, says the new is stronger than the old. What was the old? Section 341 of the old reads: * * * "Unless they * * * justify * * * as prescribed by sections 195 and 196, within ten days thereafter, the appeal shall be regarded as if no undertaking had been given." Section 195 relates to the appearance of sureties for justification, and section 196 reads: "If the judge shall find the bail sufficient he shall annex the examination to the undertaking, indorse his allowance thereon, and cause them to be filed with the clerk," * * * &c. Section 1335 of the new Code merely incorporates in one the several provisions of the old relating to the manner of justification and the effect of failure. In substance, though not in form, the provisions of both are the same. But approval has always been regarded as a necessary part of justification (*O'Neil* agt. *Durkee*, 12 *How.*, 94; 2 *Abb.*, 383; *Gross* agt. *Bouton*, 9 *Daly*, 25; *Archbold's Pr.*, 89; *Wilson* agt. *Allen*, 3 *How.*, 369). The reason is apparent. The object of the examination is to satisfy the judge of the sufficiency of the surety, and the evidence of such satisfaction is the indorsement.

IV. Up to the 17th of September, 1875, it must be clear to the court that the appellants had utterly failed to comply with the terms of the first order. Then the undertakings of defendant Townsend were given. In the respect of conforming to section 338 they were equally defective. He was examined; the judge indorsed approved upon the undertaking in action No. 2, but none appears upon that in No. 1. The papers now appear to be pinned together. On one the blank indorsement appears, but both are separately marked, filed September seventeenth. Is it not more reasonable to say that the judge refused to approve but one, than that he intended to approve both, because approval appears on one? A liability of \$7,500 is not insignificant, and while the judge might have thought defendant good for \$7,500, he might very properly have doubted his sufficiency for \$15,000.

V. The undertakings, though given pursuant to an order, derived their force from it and the statute as well. Without an undertaking the appellants' right of appeal was complete. To obtain a stay an order was necessary. Such order may be made upon such terms as the court deems just (*Old Code*, sec. 343). And the terms are within the dis-

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cretion of the court. In this case the court incorporated in the order the provisions of sections 334 and 338, the first providing that the undertaking must have two sureties, and the second that the proceedings shall not be stayed unless waste, &c., provided for. By section 339 when these provisions are complied with there is a stay. These provisions are statutory. True, they may be waived, but there must be a definite and complete agreement to that effect (*Post* agt. *Doremus*). In *Langley* agt. *Warner* (1 *N. Y.*, 606) the word "costs" was omitted; *held*, that the appeal was ineffectual. In *Arnous* agt. *Homans* (32 *Hov.*, 383), *held*, that the omission of the words "in case the appeal be dismissed" irregular. It must be conceded that the contingency upon which the stay was to go into effect never happened; the conditions were never fulfilled, and there never was a stay. If there was no stay, there was no consideration for Townsend's undertakings (*Post* agt. *Doremus*; *Manning* agt. *Gould*; *Doolittle* agt. *Dinniny*, 81 *N. Y.*, 350; *Roberts* agt. *Donnell*, 31 *N. Y.*, 446).

VII. It is sought to hold defendant upon the ground of estoppel; in other words, because the premises were not actually sold until after the decision on appeal. Yet the plaintiff Hooker was under no obligation whatever to delay. The same point was raised in *Manning* agt. *Gould* and *Post* agt. *Doremus* and overruled. A stay comes from an order or agreement (*Post* agt. *Doremus*). Mere forbearance in the absence of a definite agreement avails nothing (*Atlantic Nat. Bank* agt. *Franklin*, 55 *N. Y.*, 235). Having a perfect right to proceed, the plaintiff lies by and does nothing. Nothing was ever said by Townsend or anybody else to induce him to wait. An estoppel is defined to be an admission or declaration which the law does not permit him who has made it to deny or disprove for his own benefit and to the injury of another (3 *Pars. on Cont.*, p. 787). All the cases upon this point cited by the plaintiff's counsel are those chiefly arising on replevin bonds or undertakings on attachment, where property has been taken upon the faith of the instrument, yet none of these cases were considered in the leading cases referred to. Undertakings on appeal stand upon a different footing. The statute prescribes the effect of failure to justify, etc., and this furnishes a complete answer to the objection of estoppel. The plaintiff cannot have a dual right to proceed, and at the same time treat the undertaking as valid security. Yet that is just what is claimed here. Surely unless the plaintiff could have enforced his judgments, defendant might be estopped, but the statute emphatically defined the rights of the respondent. *Bates* agt. *Merrick* (3 *Hun*, 568) is not in point, for the question arose in demurrer to the complaint which averred a stay (*Ell* agt. *Burke*, 63 *N. Y.*, 111; *Decker* agt. *Anderson*, 39 *Barb.*, 846). Actions on undertakings in replevin are distinguished in *Manning* agt. *Gould*, which expressly states that undertakings in replevin are not analogous. *Warner* agt. *Ross* (9 *Abb. N. C.*, 335), only follows the decision in *Board of Education* agt. *Fonda* (77 *N. Y.*, 336), and lays down no new rule. The

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latter case holds there was a good consideration for the bond and hence it was valid, though not in the form of the statute.

VIII. Interest is not recoverable (*Brainerd* agt. *Jones*, 18 N. Y., 35; *Hamilton* agt. *Van Rensselaer*, 43 N. Y., 244; *Beers* agt. *Shannon*, 73 N. Y., 304), in the absence of proof of special damage.

IX. As to the point of hardship. The law is clear that the contract of suretyship is to be strictly construed (*Rae* agt. *Beach*, 76 N. Y., 169). This action was begun in 1877, and from that time to the month of February, 1883, it lay dormant, until Mr. Townsend thought it absolutely dead. From the date of the giving of the undertakings is over eight years. Why has plaintiff delayed? In such a length of time many changes occur. Shall plaintiff now, after such laches, be heard to complain of hardship? If it exist, clearly Townsend is the sufferer.

The complaint should be dismissed.

Townsend, Wandell and Edward S. Clinch, for plaintiff:

ACTION upon two undertakings given by the defendants in two actions of *Hooker* agt. *Martin* upon an appeal by defendants from a decree of foreclosure.

The proceedings in the two actions were carried along together and the following is a record of them:

May 19, 1875.—Judgments of foreclosure.

July 17, 1875.—Order providing for a stay of proceedings, under the judgments on appellants giving undertakings, in compliance with sections 334 and 338 of the Code of Civil Procedure.

August 14, 1875.—Notices of appeal given.

August 14, 1875.—Undertakings by Howard A. Martin and Runyon W. Martin.

September 6, 1875.—Order dismissing justification because of failure of Howard A. Martin to appear for examination, Runyon W. Martin having been examined.

September 7, 1875.—Order that plaintiff show cause why Howard A. Martin and Runyon W. Martin should not be allowed to justify.

September 10, 1875.—Howard A. Martin examined as a surety, and undertakings on which he and Runyon W. Martin were sureties submitted to justice BRADY for his decision.

September 14, 1875.—Decision of Mr. justice BRADY that Howard A. Martin was insufficient and requiring appellants to produce one other surety in his place. Runyon W. Martin accepted and form approved.

September 17, 1875.—Defendants' undertakings executed and filed. Defendant examined as a surety and undertakings approved as to form and sufficiency of surety by Mr. justice DONOHUE.

September 24, 1875.—Order entered under decision of justice BRADY, of September fourteenth, rejecting Howard A. Martin as surety.

April 7, 1877.—General Term judgment of affirmance.

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May 4, 1877.—Referee's report of sale. Notice of filing reports and of motion to confirm.

June 5, 1877.—Order confirming reports and directing docket of judgment for deficiency. Notice of entry of judgment of affirmance, and of order confirming report and directing docket of judgment.

May 23, 1877.—Executions on judgments for costs.

June 7, 1877.—Executions on judgments for deficiency.

POINTS.

The defenses set up by answer are: First. That the defendant is an attorney at law, and for that reason cannot be held as a surety. The evidence on the point is that of Mr. Wandell who testified that he knew the defendant, but did not know that he was an attorney in active practice at the time the undertakings were given, and the justification of the defendant, which shows that the defendant testified that he had not been in active practice within a year preceding his justification. But attorneys at law may be held as sureties. Their attorneyship is a privilege which they may assert for their own protection and which they may waive (*Wilmont* agt. *Messole*, 48 *How.*, 430; *Evans* agt. *Harris*, 47 *Supr.*, 386). The second defense is (10th paragraph): That the undertaking in action No. 1 was never approved by a justice of this court. The evidence is that the two undertakings and the justification were fastened and filed together with the undertaking in action No. 2 on the outside, and the approval of the judge is indorsed on the outside wrapper. The third defense is: That the undertakings of the defendant did not comply with the order of July 17, 1875, providing for a stay of proceedings in the foreclosure actions upon the execution of undertakings that neither Howard A., nor Runyon W. Martin qualified or was approved as a surety. That on September 10, 1875, Howard A. Martin was examined as a surety and adjudged insufficient, and that on September seventeenth, defendant executed the undertakings on which this action is brought, and that on September 24, 1875, the order was made under Mr. justice BRADY's decision rejecting Howard A. Martin as a surety, and by virtue of these proceedings (14th paragraph of answer) the proceedings of the respondents on said appeals (?) were never stayed by the undertakings of defendant. It will be noticed that many of the facts alleged under this defense are disproved by the evidence, and that the only questions raised by the counsel for the defendant left for the decision of the court are questions of law. I. Did the undertakings given by Runyon W. Martin and the defendant Townsend comply with the order of 17th July, 1875? The order directed the defendants who appealed to give a written undertaking with two sufficient sureties "in each of these actions in the usual form, in compliance with the requirements of sections 334 and 338 of the Code of Procedure, and specially providing for the payment of any deficiency to arise upon the sale of the mortgaged prem-

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ises, pursuant to the judgments herein, to the amount of seven thousand five hundred dollars in each of said actions Nos. 1 and 2." Pursuant to this order the appellants gave an undertaking with Runyon W. Martin and Howard A. Martin as sureties. Runyon W. Martin was examined as a surety, and the examination of Howard A. Martin was adjourned to 6th September, 1875. Failing to appear on this day the justification of both sureties was dismissed. On 7th September, 1875, an order was obtained requiring plaintiff to show cause why both sureties should not be allowed to justify, and then under this order Howard A. Martin was examined as a surety, and on the tenth the sufficiency of the undertakings and of the sureties, Runyon W. Martin and Howard A. Martin, was submitted to Mr. Justice BRADY for his decision, and he approved the form of the undertaking and the sufficiency of Runyon W. Martin (see his decision and the testimony of Mr. Wandell), but required appellants to produce another surety in the place of Howard A. Martin. In this decision of Mr. Justice BRADY we have an adjudication that the form of the undertaking was sufficient; in other words, that the undertaking as to form complied with the order that permitted it to be given, a decision binding on the appellants, on the respondent and on the surety, who was approved. The decision of Mr. Justice BRADY was filed 14th September, 1875, but the order under it was not entered until the twenty-fourth. No weight should be given to the proposition of defendant's counsel that because this order was entered after the defendant gave his undertakings, the latter was released from his obligations. On the 17th September, 1875, the defendant's undertakings were filed by which the defendant undertook: 1st. That the appellants would pay all costs and damages that might be awarded against them on said appeal not exceeding \$500 (*Sec. 384, Code*). 2d. In the further sum of \$7,500 that if the said judgments or any part thereof were affirmed the appellants would pay any deficiency arising upon the sale of said premises (*Sec. 388*). The defendant was examined as a surety and the question whether his undertakings complied with the order of July 17, 1875, and the sufficiency of the defendant as a surety were submitted to Mr. Justice DONOHUE for his decision and he decided that the undertakings did comply with the order of July 17, 1875, and that the surety was sufficient. His decision, indorsed on the outside wrapper of the two undertakings and the justification, is in these words: "The within undertaking is hereby approved as to its form and the sufficiency of its surety. Dated 23d September, 1875. CHAS. DONOHUE, J. S. C." Here there is a second adjudication as to the form of the undertaking, binding until reversed, upon all interested parties, and it is submitted that the court at circuit will not review these adjudications. But the defendant says that Runyon W. Martin was released because his co-surety Howard A. Martin was not approved, and therefore the defendant is not bound. To this the plaintiff answers: 1st. The court at chambers has decided that the undertakings of Runyon W. Martin

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and of Townsend comply with the order of 17th July, 1875, and that means that as that order required two sureties, so two sureties are furnished on two bonds. 2d. Under section 840 of the Code of Procedure undertakings could be in one or more instruments (*Gottwald agt. Tuttle*, 7 *Daly*, 105). 3d. Undertakings could, under the old Code, be either joint or several in form (*Wood agt. Fisk*, 63 *N. Y.*, 248-9). 4th. The defendant is liable on his undertakings, even if Runyon W. Martin is not liable on his, and the defendant would be if no other undertakings had been given. Because: (a.) The provision for two sureties is for the benefit of the respondent, and if he waive one the bond is not invalidated (*Ward agt. Whitney*, 3 *Sandf.*, 899; *Shaw agt. Tobias*, 3 *N. Y.*, 188; *Gottwald agt. Tuttle*, *supra*). (b.) Should the court review the decisions of justices BRADY and DONOHUE as to the form of the bonds, and come to the conclusion that the bonds of defendant do not comply with the order of 17th July, 1875, the defendant may still be held liable as on a common law bond (*Werner agt. Ross*, 9 *Abb. New Cases*, 885, 890; *Decker agt. Judson*, 16 *N. Y.*, 443). (c.) Should the court hold that the undertaking was not in the form called for by the Code or the order of 17th July, 1875, yet as it secured the end for which it was given, and stayed proceedings, the sureties are liable (*Chamberlain agt. Applegate*, 2 *Hun*, 510; *Hill agt. Burke*, 63 *N. Y.*, 111; *Gibbons agt. Bernhard*, 3 *Bow.*, 638; *Gerould agt. Wilson*, 81 *N. Y.*, 578). The defendant also says that there was no consideration for his bonds, because as a matter of law the proceedings under the judgments of foreclosure were not stayed by his and Runyon W. Martin's undertakings. The court, at chambers, thought differently when it approved the form of the undertakings of Runyon W. Martin and of the defendant, and Mr. Wandell says the proceedings were in fact stayed. After justices BRADY and DONOHUE had decided that Runyon W. Martin and Townsend were sufficient sureties and that the undertakings were in proper form, could the plaintiff, because he might be of a different opinion, enforce his judgment? Would he not be guilty of a contempt of court should he do so? Is it not more reasonable to regard the decisions of justices BRADY and DONOHUE as adjudications binding upon the appellants, the respondents and the sureties? If they cannot be so regarded and treated as final adjudications the anomaly is presented of a decision binding upon the respondent because no appeal from the allowance of an undertaking can be taken, but not binding on the appellant or his surety. But the proceedings were stayed the moment the undertakings were given, and the stay was continued when the undertakings were approved as to form and the sureties as to sufficiency. Why, after the respondent had objected to the form of the undertakings and the sufficiency of the sureties, was the question of form and sufficiency presented to the court if it was not to procure a decision on the questions of form and sufficiency, that the respondent might prosecute his judgments, if the decisions were in his

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favor, and the appellants stay its prosecution if the decision were in their favor. As a matter of fact the proceedings having been stayed, because the defendant gave his undertakings, it is really of no importance to consider whether the appellants were on the undertakings legally entitled to a stay. The stay was obtained by virtue of the undertakings, and that was a consideration (*Coleman agt. Bean*, 32 *How. Pr.*, 380 [*Cl. of App.*]). The defendant is estopped contradicting any recital in his undertakings (*Coleman agt. Bean*, 32 *How.*, 370; 1 *Abb. Cl. of App. Cases*, 394; *Bank of U. S. agt. Housman*, 6 *Paige*, 535; *Drossy agt. Morgan*, 74 *N. Y.*, 11). The defendant having executed the undertakings and given them as valid and complete instruments, and the respondent having been delayed in the prosecution of his judgments by reason thereof, the undertakings are valid and binding on defendant (*Russell agt. Freer*, 56 *N. Y.*, 67). In *Shaw agt. Tobias* (3 *N. Y.*, 192), the court said: "But after the plaintiff has obtained possession of the property in dispute by acting on the bond as a lawful and valid security, neither he nor his surety ought to be permitted to get rid of it by alleging that it is not as strong or as perfect as the respondent might have required him to make it. It is enough that it contains all the essentials of a valid contract and answers all the purposes intended by the statute." If the undertakings do not comply with the terms of the order or of the statute, that fact will not avail the surety, for "the substance is looked for more than the form, even though it be a surety that is to be held" (*Gerould agt. Wilson*, *supra*, 81 *N. Y.*, 578; *Ring agt. Gibbs*, 26 *Wend.*, 502). The court held on the trial that both the defendant's undertakings were approved, they having, with the written examination, been filed together and Mr. Justice DONOHUE having indorsed his decision upon the outside wrapper. The approval under the old Code was not necessary to give validity to the undertakings. The approval was for the benefit of the respondent and might be waived by him (*Gopsill agt. Decker*, 4 *Hun*, 625; *Ballard agt. Ballard*, 18 *N. Y.*, 491; *Decker agt. Anderson*, 39 *Barb.*, 346). The plaintiff is entitled to recover interest on the penalty of the undertakings from the time the liability accrued (*Purdy agt. Phillips*, 11 *N. Y.*, 406; *Emerson agt. Booth*, 57 *Barb.*, 40; *Brainerd agt. Jones*, 18 *N. Y.*, 35; *Code Civil Proc.*, sec. 1915). And the interest recoverable is to be computed at the rate of seven per cent to 1st January, 1880, and thereafter at six per cent (*Rouse agt. Northern Ins. Co.*, 12 *Weekly Dig.*, 85; *Dows agt. Kidder*, 3 *Law Bull.*, 62; *Little agt. Banks*, 85 *N. Y.*, 267). Judgment should be ordered for the plaintiff for the amount of costs, \$228.23, with interest from 7th April, 1877, and for the penalty of the two undertakings, \$15,000, with interest from 4th June, 1877.

CASES CITED BY DEFENDANT'S COUNSEL.

Manning agt. Gould (90 *N. Y.*, 476). The undertaking in this case was given under the Code of Civil Procedure, which expressly provides (*Sec. 1835*) that a "failure to justify and to procure an allowance is the same as

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if the undertaking had not been given." The question before the court was (p. 479) "whether the sureties to an undertaking given on appeal to the general term of the supreme court or of a superior city court, when excepted to, and they fail or refuse to justify, and justification is not waived by the respondent, are nevertheless bound by the conditions of their undertakings." That is not this case, because the surety here did justify and was approved (*Post* agt. *Doremus*, 60 N. Y., 371). On an appeal from an order granting a new trial the appellants gave an undertaking which provided that "if the judgment so appealed from" was affirmed, the appellant would "pay the amount directed to be paid by said judgment." The court of appeals held that as no judgment had been appealed from, no liability could attach because of this provision in the undertaking, and it is this part of the undertaking that is discussed in the opinion of the court. There is nothing in the whole opinion inconsistent with plaintiff's right of recovery herein, but on the contrary there is a plain indication of the opinion of the court that if a respondent is compelled by the action of the court, in respect to an undertaking, to refrain from any action, the surety on the undertaking is liable (*Gross* agt. *Bouton*, 9 *Daly*, 25). In this case it appeared that the appellant in four actions had given undertakings on appeal, with the defendants B. and C. as sureties. B. justified, C. did not. An order was then made that the appellant be allowed to substitute a new surety in place of C., and that new undertakings should be executed. The appellant filed new undertakings with new sureties who justified, and the new undertakings were approved by the justice. The undertakings executed by B. and C. were not presented to the justice for approval, and the sufficiency of B. and C. was not passed upon. This action was brought against B. and C. upon the undertakings executed by them, and it was held that the action would not lie. There seems to be no analogy between this case and the one at bar. If it shall be thought that the expressions in the opinion of Mr. justice VAN BRUNT in this action are inconsistent with the opinion of the general term in *Gottwald* agt. *Tuttle* (7 *Daly*, 105) it is proper to observe that the opinion of Mr. justice VAN BRUNT in *Gross* agt. *Bouton* is not concurred in by justices DALY and LARREMORE, but that they concur simply in the result of his conclusions, and that his decision at special term in *Gottwald* agt. *Tuttle* was reversed by the general term (*Halsey* agt. *Flint*, 15 *Abb. Pr.*, 367). In this action the defendants had given an undertaking upon appeal to pay all costs and damages which might be awarded against the appellant, not exceeding \$250. An undertaking to stay proceedings under the judgment was not given, and the court held that the sureties were liable only for the costs on the appeal and not for the interest on the judgment appealed from. In its opinion the court remarked: "It is not probable that it (the undertaking) was understood on either side as designed to effect a stay of proceedings." The attention of the court is called to that part of the opinion which holds that if the undertaking were intended as

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a stay of proceedings all parties would be bound by it as such. The court say (p. 370): "I am inclined to think that if it were obvious that the undertaking was intended as a stay of proceedings, and was defective only in some slight particulars, the omission to object to it or to disregard it until after judgment in the appellate court would be regarded as tantamount to an acceptance of the undertaking as a stay of proceedings, and that both parties would be bound by it as such." The court did not apply the rule in that case because: 1st. It was not sufficiently obvious that the undertaking was intended as a stay of proceedings. 2d. There was no evidence that the respondent treated it as intended, as a stay of proceedings (*Watt agt. Watt*, 15 *Abb. Pr.*, 367, *note*). In this case the defendant moved, in an action for the foreclosure of a mortgage, for a stay of proceedings on an appeal to the court of appeals upon a proposed undertaking to pay all costs and damages not exceeding \$250. The court held this undertaking not sufficient to stay proceedings and directed an undertaking to be given under section 838. There is nothing in this case pertinent to the questions at issue in the action at bar.

Judgment should be ordered for the plaintiff.

SUPREME COURT.

ALONZO HORTON, as overseer of the poor of the town of Hanover, &c., agt. ELIAS CARRINGTON.

Overseer of the poor — Oath of office — Excise laws — New trial — Acts of de facto officer, to what extent valid.

In an action brought by N., as overseer of the poor, to recover a penalty for the violation of the excise laws, N.'s term of office expired during its pendency and M. was elected to succeed him, but he afterwards resigned, and H., at a special town meeting, was elected his successor, and by order of this court, entered upon stipulation, the action was continued in name of H. It was objected on the trial that neither N. nor M. had taken the oath of office, as was required to be done by the amendment to the constitution, and that therefore the action had not been lawfully commenced by N.:

Held, first, that as N. had taken and filed the oath, which had previously been required by statute, and given the usual bond (although the oath was defective under section 1, article 12 of the constitution), and then entered upon and discharged the duties of the office, he held it under the authority of a lawful election, and by at least a colorable compli-

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ance with the requirements of the law, and that is all which could be required to entitle him to represent the interest of the public as overseer of the poor of the town.

As he was in office by virtue of the election, and this colorable compliance with the official requirements made upon him, he was at least a *de facto* officer, whose acts were valid so far as they concerned the public, or the rights of third persons having an interest in the discharge of his duties.

As M. presented his resignation and it was accepted, and he ceased to discharge the duties of his office, and a notice of a special meeting was given and such town meeting was held, and H. was elected as the successor of M. and after that qualified and entered upon the discharge of the duties of the office, his right to continue the suit as overseer of the poor cannot be questioned.

That the overseer himself was named in the title of the action is not error for which a new trial should be granted when after his name appeared the words "overseer of the poor."

That the spirituous liquors which the evidence tended to prove were obtained from the defendant were not sold at the place mentioned in the complaint, is simply a variance, and where it does not appear to have misled the defendant to his prejudice, cannot entitle him to a new trial.

Chautauqua Special Term, October, 1884.

MOTION for new trial on case and exceptions.

J. G. Record, for defendant.

Allen & Thrasher, for plaintiff.

DANIELS, J.—The action was brought to recover penalties for the violation of the excise laws, by the sale of intoxicating liquors in quantities less than five gallons, without a license. It was commenced by Ansel S. Nevins, as overseer, whose term of office expired during its pendency. Charles Moore was elected to succeed him, but he afterwards resigned, and Horton, at a special town meeting, was elected as his successor; and by an order of the court, entered upon a stipulation of the attorneys of the parties, the action was continued in the name of Horton.

It was objected upon the trial that neither Nevins nor

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Moore had taken the oath of office, as that was required to be done by the amendment to the constitution of the state, and that this action, therefore, had not been lawfully commenced by Nevins. He did, however, take and file the oath which had previously been required by statute, and gave the usual bond, and then entered upon and discharged the duties of the office. He held it, therefore, under the authority of a lawful election, and by at least a colorable compliance with the requirements of the law, and that was all which could be required to entitle him to represent the interests of the public as overseer of the poor of the town. Although the oath taken and filed by him was insufficient, and neither in substance nor in form all that was required by section 1 of article 12 of the constitution, it was still an oath of office, as far as it proceeded, and partially, in that manner, complying with this requirement. It was defective for omitting the second paragraph prescribed by this article of the constitution; but nothing in the constitution, or in the statutes of the state divested the overseer of his office because of this omission. It was still a defective oath of office, and under its authority, and that of his election, the overseer entered upon the discharge of his duties. In this respect the case very materially differs from that of the *People* agt. *Nostrand* (46 *N. Y.*, 375), for there the commissioner had absolutely vacated his office by accepting the office of sheriff. He had been, by the terms of the statute, effectually removed from his office of commissioner, while in this case the overseer had encountered no such disability whatsoever. As he was in the office by virtue of the election, and this colorable compliance with the official requirements made upon him, he was at least a *de facto* officer, whose acts were valid so far as they concerned the public or the rights of third persons having an interest in the discharge of his duties (*People* agt. *Hopson*, 1 *Denio*, 575, 579).

Upon this subject it has been held that an officer who has been elected and has the certificate of the proper authority to that effect, becomes qualified to hold the office, although his

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title to it will be defeasible for not having taken the oath prescribed by law (*People agt. Crissey*, 91 *N. Y.*, 616, 635.) And that such an officer as the overseer of the poor was, for filing his defective oath, may exercise the functions of the office, is further sustained by *Foots agt. Stiles* (57 *N. Y.*, 29); *Cronin agt. Gundy* (16 *Hun.*, 520); and *Matter of Kendall* (85 *N. Y.*, 302).

The application of these authorities to this case is denied, for the reason, as it has been urged, that the overseer should be required to establish a strict legal compliance with the provisions of the constitution relative to his oath before he could be permitted to commence or maintain an action for the recovery of the penalties claimed in this action. But in no view which can be taken of this case is it one where he is endeavoring to recover the money for himself, for by chapter 109 of the Laws of 1878, where a recovery shall be had, it is made the duty of the overseer to pay over the money to the treasury of the county for the support of the poor of the town or city in which the penalty has been incurred. The money, therefore, would in no event belong to the overseer, and the case, for that reason, would not be within anything which was said in the opinion in *People agt. Nostrand* (*supra*).

The right of Horton to continue the action was further resisted because Moore was not deemed to have legally surrendered his office as overseer, and for the further reason that Horton himself was not legally elected as his successor. But Moore did present his resignation and it was accepted, and he ceased to discharge the duties of the office. After that a notice of a special meeting was given, and the fact that it could not be produced upon the trial did not divest it of its legal effect in this respect, for it was shown that a meeting of the town did take place, and that Horton was elected as the successor of Moore, and after that qualified and entered upon the discharge of the duties of the office, and as to his right to continue the suit as the overseer of the poor of the town no doubt, therefore, is now entertained.

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It has been urged that the overseer himself should not have been named in the title of the action, but that it should have been brought in the name of the office of the overseer of the poor of the town. Chapter 109 of the Laws of 1878 may possibly be susceptible of this construction; but even if it should be held to be so, it would not affect the disposition of this case, forasmuch as that was stated in the title of the action after giving the name of the overseer himself. If his name, as overseer, was not necessary or proper, the action would still be good as an action in the name of the office of the overseer of the poor of the town, for that was the form given by the title in addition to his own name as overseer.

It is urged that the spirituous liquors which the evidence tended to prove were obtained from the defendant, were not sold at the place mentioned in the complaint; but even if they were not, this was simply a variance which did not appear to have misled the defendant to his prejudice, and for that reason cannot now entitle him to a new trial of the issues in the action.

The evidence which was given tended to show a purchase of the intoxicating liquors from him, and the fact that the druggist to whose store the defendant went with the bottles did not sell whisky uncompounded with other substances, tended very directly to confirm the position taken by the plaintiff upon this part of the case. The evidence was sufficient, although the defendant himself testified to the contrary, to justify the jury in reaching the conclusion that the sales were made by the defendant as they were alleged to have been made in the complaint. A case was made out to a reasonable degree of certainty, and as neither of the exceptions can be sustained, the motion for a new trial must be denied, with the usual costs.

Spiegel *et al.* agt. Thompson.

N. Y. CITY COURT.

MORRIS SPIEGEL *et al.* agt. HERBERT H. THOMPSON.*Answer — Insufficient denial.*

A denial in an answer of each and every allegation not hereinafter specifically admitted, controverted or denied is insufficient.

*Trial Term, February, 1884.**Nathan L. Hahn, for plaintiffs.**William P. Mulry, for defendant.*

McADAMS, C. J.—An answer which “denies each and every allegation not hereinafter specifically admitted controverted or denied” uses a form of denial not authorized by the Code and no issue is created by it (*Miller agt. McCloskey*, 1 *Civ. Pro. R.*, 252; *S. C.*, 9 *Abb. N. C.*, 303; *McEnroe agt. Decker*, 58 *How. Pr.*, 251; *Hammond agt. Earle*, 5 *Abb. N. C.*, 106).

The sale and delivery of the goods by the plaintiffs having been admitted by a failure to properly deny the same (*Code*, sec. 522), it became immaterial whether the plaintiffs were partners or not, as a sale made by them jointly entitled them to a recovery independently of the question of partnership (*Millard agt. Thorn*, 56 *N. Y.*, 402).

An inspection of the pleadings readily demonstrates that no injustice has been done.

Motion for a new trial denied.

Granger agt. Sheble.

SUPREME COURT.

In the Matter of ELIHU J. GRANGER, defendant and appellant,
agt. EDWIN A. SHEBLE, plaintiff and respondent.

*New York city court — Place of trial — Change of — Removal of cause from
New York city court to supreme court and change of place of trial — How
effected — Code of Civil Procedure, section 319.*

Under section 319 of the Code of Civil Procedure an application for the removal of a cause from the New York city court into the supreme court, and to change the place of trial, may be made at any time after the joinder of an issue of fact, and before the trial thereof, and no demand is necessary for a change of place of trial prior to the notice of application. Whether the order should be granted or not is purely a matter of discretion.

Where, on appeal from an order denying the motion to remove, it appeared that the justice granting the order did not examine the case upon its merits the elements of discretion is not called in question.

It seems, that in applications of this character something more is required to be shown than the mere fact that the defendant is not a resident of the county where the action is brought.

First Department, General Term, October, 1884.

Before DAVIS, P. J., BRADY and DANIELS, JJ.

APPEAL from an order denying a motion to remove a cause from the New York city court into the supreme court, and change the place of trial to Kings county. The ground of the motion was that the plaintiff was a non-resident and Kings county was the proper county. No demand was served.

Oswald Prentiss Backus, for appellant.

W. H. H. Russell, for respondent.

PER CURIAM.—The application to change the place of trial was predicated of section 319 of the Code, which declares what sections shall be applicable to the proceedings contemplated.

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It appears that this action was commenced on the 18th of March, 1884; issue was joined on the twenty-fourth of April following, and a motion to change the place of trial to the second district noticed for the twenty-sixth of April, and argued on the fifth of May.

The learned justice in the court below denied the motion on the ground that it was too late. We think this was a misapprehension of the provisions of the Code relative to applications kindred to this. The section already mentioned declares that the application may be made by an order at any time after the joinder of an issue of fact and before the trial thereof, and does not require in express terms or by implication that any demand should be made for a change of place of trial prior to the notice of application. Whether the order should be granted or not is purely a matter of discretion (*Cornell agt. Evans*, 7 Hun, 299).

It seems that the learned justice in the court below did not examine the case upon its merits, and, therefore, the element of discretion was not called into requisition. For these reasons we think that the order should be reversed with leave to renew the motion on its merits. It is proper to suggest that in this and all similar applications something more is required to be shown than the mere fact that the defendant is not a resident of the county where the action is brought.

Order reversed, with ten dollars costs and disbursements.

People *ex rel.* Perkerson agt. The Sisters of the Order of St. Dominick.

SUPREME COURT.

THE PEOPLE *ex rel.* ELIZA PERKERSON, respondent, agt. THE SISTERS OF THE ORDER OF ST. DOMINICK, appellants.

Habeas corpus—Hearing before committing magistrate not to be reviewed upon—Evidence—Penal Code, section 291—Sufficiency of evidence to justify commitment under this section.

A female child, under fourteen years, who was committed by a police magistrate for violation of section 297 of the Penal Code, to an institution authorized by law to receive and take charge of minors, was discharged on writs of *habeas corpus* and *certiorari* by the judge issuing the writs, though the commitment was not claimed to be either informal or defective:

Held, That the judge issuing the writs could not, by means of them, review the hearing had before the committing magistrate, and determine whether he had or had not acted upon sufficient evidence in making the order of commitment.

Evidence taken in writing, subscribed and sworn to by the witness, that a certain female child "actually and apparently under the age of fourteen years, to wit, aged twelve years, was found begging, receiving and soliciting alms" in a specified street, established all that was required to justify the commitment.

First Department, General Term, January, 1885.

Before DAVIS, P. J., BRADY and DANIELS, JJ.

APPEAL from an order discharging Annie Holton from the custody of the Sisters of the Order of St. Dominick.

John B. Pine, for appellant.

E. T. Gerry, of counsel, for the New York Society for the Prevention of Cruelty to Children.

James Oliver, for respondent.

DANIELS, J.—Annie Holton, the person discharged, had been committed to the custody of the Sisters of the Order of St. Dominick by a commitment of one of the police justices

People *ex rel.* Parkersoen *agt.* The Sisters of the Order of St. Dominick.

of the city of New York. She was so committed for violating subdivision 1 of section 291 of the Penal Code of the State. By that section a female child, actually or apparently under the age of fourteen years, who is found begging, or receiving or soliciting alms in any manner or under any pretense, may, by subdivision 5, be arrested and brought before a court or magistrate as a vagrant, disorderly or destitute child, and the court or magistrate is authorized to commit the child to any charitable reformatory or other institution authorized by law to receive and take charge of minors. No controversy has been made as to the authority of the sisters of the order to receive the custody of the child under these provisions of the Penal Code. Neither was the commitment under which she was consigned to their custody in any manner informal or defective in carrying out these directions of the law. But still, an application was made by the petitioner for a writ of *habeas corpus* and *certiorari* to discharge the child from the custody of the sisters. These writs were each issued, the *habeas corpus* to the sisters themselves, and the *certiorari* to the police justice before whom the child had been taken and who had committed her to the custody of the order.

The *habeas corpus* was returned with the commitment as the authority under which the child was detained, and the police justice returned the sworn complaint, or evidence produced before him, upon which he determined the case to be within this section of the statute. Upon the hearing before the judge issuing the writ, an order was made discharging the child from custody, and it is from that order that the appeal has been taken.

The proceedings seem to have been instituted and the hearing afterwards had upon the supposition that the judge issuing the writs could by means of them review the hearing had before the justice, and determine whether he had or had not acted upon sufficient evidence in making the order resulting in the commitment of the child. It was, in other words, designed that the judge should review the hearing, not by

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given to the judge to issue a *certiorari* for the purpose of bringing before himself, or before the court where the hearing is to take place, the evidence upon which a final determination may have been made by the court, or officer, before which the proceeding has taken place. And that such a review was neither contemplated nor intended, clearly results from the directions contained in section 2032 of the Code. For that has directed that the court or judge must forthwith make a final order to remand the prisoner if it appears that he is detained in custody by virtue of a mandate issued by a court or judge of the United States having exclusive jurisdiction of the case; or second, by virtue of the final judgment or decree of a competent tribunal of civil or criminal jurisdiction, or the final order of such a tribunal made in a special proceeding instituted for any cause, except to punish him for a contempt, or by virtue of an execution or other process issued upon such judgment, decree, or final order. This direction excludes, by necessary and clear implication, the authority to inquire into the force and effect of the evidence upon which the determination may have been made. They are no more than a repetition of those previously contained in the Revised Statutes. And this construction is further sustained by those contained in section 2033 of the Code, declaring the cases in which the person may be relieved from imprisonment, neither of which includes or justifies a review of the evidence resulting in the judgment or order of the court or officer. Even the much criticised case of *People agt. Liscomb* (60 N. Y., 559), does not permit an inquiry into the effect of the evidence to be made. For by that it was held that the court, or officer, could not go behind the judgment and inquire into errors or irregularities preceding it, to determine whether it had been properly entered or not, but was confined to the judgment and process itself in the hearing and decision which might be made.

The point whether a court, or officer, could go beyond the commitment or order set forth in its recital, to determine

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whether it was justified by the evidence, has been often examined in other cases, where it has been held that such a proceeding was wholly unauthorized (*Stewart's case*, 1 Abb., 210; *Matter of Prims*, 1 Barb., 340; *Gray's case*, 11 Abb., 50; *Bennac agt. People*, 4 Barb., 31; *Case of Twelve Commitments*, 19 Abb., 394; *Case of Williamson, Id.*, 413.)

The statute required no more to take place before the magistrate than appears by the commitment to have been done, for it has simply provided that when a child shall be brought before him for a hearing he may commit it to such an institution as is maintained by the appellant. No other or more formal proceeding than that which took place has been provided, and by the recitals in the commitment all the requirements contained in the statute appear to have been observed.

If, however, any investigation under the *habeas corpus* act can be made into the sufficiency of the evidence before the magistrate, then that which was taken was sufficient to comply with the requirements of the statute. The form in which it should be taken has not been prescribed, and it has accordingly, in an uncontested case, been left very much to the discretion of the magistrate. It was taken by him in writing, subscribed and sworn to by the witness, and established all that was required to justify the commitment which was made. It was in the following form:

STATE OF NEW YORK, }
CITY AND COUNTY OF NEW YORK. } ss.:

John F. Potter, of Earl's Hotel, Canal and Centre streets, being duly sworn, deposes and says that on the 14th day of January, 1884, at the city of New York, in the county of New York, one Annie Holton, a female child actually and apparently under the age of fourteen years, to wit, aged twelve years, was found begging, receiving and soliciting alms in Centre street in violation of section 291 of the Penal Code.

The People *ex rel.* Eck agt. The American Female Guardian Society.

Wherefore deponent prays said child may be committed to some institute.

JOHN F. POTTER.

Sworn to before me, this 30th }
day of January, 1884. }

P. G. DUFFY,
Police Justice.

and fully sustained the conclusions of the magistrate and justified the commitment which was issued by him.

The order should be reversed, both writs dismissed, and the child recommitted to the custody of the appellant.

SUPREME COURT.

THE PEOPLE *ex rel.* HENRY ECK, respondent, agt. THE
AMERICAN FEMALE GUARDIAN SOCIETY, appellant.

*Commitment under section 291 of the Penal Code—Habeas corpus—Certiorari—
Judge issuing the writs cannot review the hearing had before the committing
magistrate.*

Where a child four years of age was committed by a police magistrate for violation of subdivision 4 of section 291 of the Penal Code, a judge cannot by means of a writ of *certiorari* directed to the magistrate, review the hearing had before such magistrate, and determine whether he had or had not acted upon sufficient evidence in making the order of commitment.

First Department, General Term, January, 1885.

Before DAVIS, P. J., and DANIELS, JJ.

APPEAL from an order discharging Wilhelmina Eck from the custody of appellant.

The People ex rel. Fox agt. The American Female Guardian Society.

John B. Pine, for appellant.

E. W. Gerry, of counsel for the New York Society for the Prevention of Cruelty to Children. /

Charles Stickler, for respondent.

DANIELS, J.—The proceedings in this case are similar to those in the case of the Sisters of the Order of St. Dominick *vs.* 182, and what has been there said concerning their regularity, and the authority of the court is equally applicable to his appeal. The commitment was that of a child of about four years of age, who was accused of frequenting the company of prostitutes and of being found with a reputed prostitute. This brought the case within subdivision 4 of section 291 of the Penal Code, and authorized the magistrate before whom the child was taken to commit her to the custody of this society. The commitment which was returned showed a full compliance with the provisions of the statute, and completely answered the application made for the discharge of the child. The court, however, in this as in the other case, by means of a writ of *certiorari* directed to the magistrate, entered upon a review of the evidence produced for his consideration; and deeming that not sufficient to warrant his determination, ordered the discharge of the child. For the reasons already assigned, this proceeding was without the sanction of the law, and the order should be reversed, the writs dismissed and the child recommitted to the custody of the appellant.

Bird agt. The Mayor, &c., of the city of New York.

SUPREME COURT.

JOHN H. BIRD, agt. THE MAYOR, &c., of the City of New York.

New York (city of) — Board of estimate and apportionment — Their power to transfer from one appropriation to that of another — Majority of board may decide.

It is within the powers of the board of estimate and apportionment to transfer from an appropriation made to a certain department for one purpose, to another purpose in the same department.

Where any number of persons are appointed to act judicially in a public matter, *all must confer, but a majority may decide.*

Therefore, where an act is authorized to be done by the board of estimate and apportionment, the ordinary rule of law applies, and a majority of the whole board, at a meeting of all the members thereof, can legally decide upon the propriety of doing such act.

At Chambers, New York, December, 1884.

John H. Bird, plaintiff in person.

David J. Dean, for defendant.

LAWRENCE, J.—Section 207 of the consolidation act confers upon the board of estimate and apportionment power to make the transfer contemplated by the resolution of November 12, 1884, which resolution is set forth in the complaint herein. Section 204 of said act, confers a similar power upon said board. The case of the present plaintiff against the mayor, &c., and the comptroller, recently decided by the general term of this department, does not deny the existence of such power. It simply decides that the power of transfer of excesses in appropriations is confined to, and can only be exercised in cases, where appropriations *actually made have proved deficient*, and that the board have no authority to use excesses for *new objects or purposes*, or to make *defeated appropriations* successful.

The resolution in question is intended to transfer from the

Act of The Board of the City of New York

WHEREAS I have to the Department of Public Works, for "materials and other necessary expenses" the sum of \$4,750, which is in excess of the amount required for the objects and purposes specified in the appropriation entitled "salaries" &c., which is authorized by the resolution, therefore, as enacted, within the powers of the Board of estimate and apportionment. It is however contended that said resolution is unconstitutional because it restricts the vote of only three members of the Board at a meeting at which all were present. The general rule is immaterial to be that where any number of persons are authorized to act judicially, in a public matter, *all* must concur, not a *majority* may decide. See *ex parte Rogers*, 7 Cowen 521 and cases cited on page 533; *People ex rel. Williamson v. Nichols*, 22 N. Y. 422; *Comptrolr. v. Hope*, 3 Denio 325. See also *Ward v. Board of Estimate*, 72.

There is no positive provision that in the matter of making transfers there shall be a unanimous vote of the Board, the provision in respect to unanimity being apparently confined to the provision for and final estimate referred to in section 189 of the Consolidation Act. In the absence of an express provision to the contrary, it seems to me that where an act is authorized to be done by the Board of estimate and apportionment, the ordinary rule of law must apply, and that a majority of the whole Board at a meeting of all the members thereof, can legally decide upon the propriety of doing such act.

For these reasons, I am of the opinion that the motion to annul the injunction, heretofore granted, should be denied, with costs.

Pettibone agt. Drakeford.

SUPREME COURT.

HIRAM C. PETTIBONE, as receiver, &c., appellant, agt.
WILLIAM E. DRAKEFORD, respondent.

Code of Civil Procedure, section 779—Stay of proceedings for non-payment of costs—When begins.

The stay of proceedings for the non-payment of costs, provided for in section 779 of the Code of Civil Procedure, does not operate to stay proceedings until default in payment; and such default does not exist until the expiration of ten days from the service of the order, or the time fixed in the order.

Fifth Department, General Term, October, 1884.

Before BARKER, P. J., BRADLEY, HAIGHT and LEWIS, JJ.

MOTION to dismiss appeal upon the ground that appellant's proceedings were stayed at the time this notice of appeal was served on respondent's attorney.

Appeal from order granting a new trial, granted May 3, 1884. Upon a motion by appellant to resettle this order on the 2d day of June, 1884, Mr. justice MACOMBER denied the motion for resettlement and directed plaintiff to pay defendant ten dollars costs of this motion.

A copy of the latter order was served on plaintiff's attorneys on the 5th day of June, 1884. On the 7th day of June, 1884, plaintiff's attorneys served notice of appeal from the order granting a new trial upon defendant's attorney, who declined to receive it, upon the grounds that the said motion costs were not paid.

A. Hadden, Esq., of counsel (Wm. E. Bonham, defendant's attorney), for motion, claimed that under section 779 Code of Civil Procedure, plaintiff's proceedings were stayed for non-payment of motion costs instantaneously from the service of the order directing payment, and cited *Hazard* agt.

People *ex rel.* Perkerson agt. The Sisters of the Order of St. Dominick.

SUPREME COURT.

THE PEOPLE *ex rel.* ELIZA PERKERSON, respondent, agt. THE SISTERS OF THE ORDER OF ST. DOMINICK, appellants.

Habeas corpus—Hearing before committing magistrate not to be reviewed upon—Evidence—Penal Code, section 291—Sufficiency of evidence to justify commitment under this section.

A female child, under fourteen years, who was committed by a police magistrate for violation of section 297 of the Penal Code, to an institution authorized by law to receive and take charge of minors, was discharged on writs of *habeas corpus* and *certiorari* by the judge issuing the writs, though the commitment was not claimed to be either informal or defective:

Held, That the judge issuing the writs could not, by means of them, review the hearing had before the committing magistrate, and determine whether he had or had not acted upon sufficient evidence in making the order of commitment.

Evidence taken in writing, subscribed and sworn to by the witness, that a certain female child "actually and apparently under the age of fourteen years, to wit, aged twelve years, was found begging, receiving and soliciting alms" in a specified street, established all that was required to justify the commitment.

First Department, General Term, January, 1885.

Before DAVIS, P. J., BRADY and DANIELS, JJ.

APPEAL from an order discharging Annie Holton from the custody of the Sisters of the Order of St. Dominick.

John B. Pine, for appellant.

E. T. Gerry, of counsel, for the New York Society for the Prevention of Cruelty to Children.

James Oliver, for respondent.

DANIELS, J.—Annie Holton, the person discharged, has been committed to the custody of the Sisters of the Order of St. Dominick by a commitment of one of the police justice

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of the city of New York. She was so committed for violating subdivision 1 of section 291 of the Penal Code of the State. By that section a female child, actually or apparently under the age of fourteen years, who is found begging, or receiving or soliciting alms in any manner or under any pretense, may, by subdivision 5, be arrested and brought before a court or magistrate as a vagrant, disorderly or destitute child, and the court or magistrate is authorized to commit the child to any charitable reformatory or other institution authorized by law to receive and take charge of minors. No controversy has been made as to the authority of the sisters of the order to receive the custody of the child under these provisions of the Penal Code. Neither was the commitment under which she was consigned to their custody in any manner informal or defective in carrying out these directions of the law. But still, an application was made by the petitioner for a writ of *habeas corpus* and *certiorari* to discharge the child from the custody of the sisters. These writs were each issued, the *habeas corpus* to the sisters themselves, and the *certiorari* to the police justice before whom the child had been taken and who had committed her to the custody of the order.

The *habeas corpus* was returned with the commitment as the authority under which the child was detained, and the police justice returned the sworn complaint, or evidence produced before him, upon which he determined the case to be within this section of the statute. Upon the hearing before the judge issuing the writ, an order was made discharging the child from custody, and it is from that order that the appeal has been taken.

The proceedings seem to have been instituted and the hearing afterwards had upon the supposition that the judge issuing the writs could by means of them review the hearing had before the justice, and determine whether he had or had not acted upon sufficient evidence in making the order resulting in the commitment of the child. It was, in other words, designed that the judge should review the hearing, not by

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judgment as the evidence would warrant, and that has not been denied in support of the present application.

But what is claimed is that upon another trial further proof could be made by a stipulation entered into in the action brought against the plaintiff for the decree nullifying their marriage by Walter W. Price, which would preclude her from recovering dower in his real estate. That stipulation was known to the parties now desirous of proving it in this action before and at the time of the trial before the referee, and it had been relied upon by way of answer as a defense. But the defendants voluntarily concluded to exclude it from their evidence, and for that reason it was not introduced during the trial. They considered the case sufficiently favorable to them without that evidence, and therefore omitted to give it. After having voluntarily adopted that as the most proper course to be followed in the management of the defense, it cannot be consistently held that they have not concluded themselves so far as to permit the success of their application. All the evidence offered which was pertinent to the case was received and acted upon, and after understandingly and voluntarily concluding the trial in that manner it is too late to open the case again for further proof. If it had been unknown or the defendants had been prevented from giving it by anything but their own volition, the application would be entitled to more favorable consideration; but as the proof was withheld simply because it was believed the defense was well enough without it, the parties affected by the conclusion to omit the stipulation must submit to the consequences of what is now stated to have been a misjudgment. Any other rule would introduce the greatest possible uncertainty in legal proceedings. If this practice could be sanctioned in this case it would be entitled to like indulgence in all others, and each party could experiment upon the tribunal hearing the action by withholding part of the pertinent proof, and then after an adverse result open the whole controversy again. If it could be permitted once it could for any number of times,

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which would effectually prevent a definite end to legal investigations. Their conduct has been subjected to a different rule, requiring each party at his peril to make all his proof, and only allowing a departure from it on account of surprise or the failure after active diligence to discover the omitted evidence or the interposition of some insurmountable obstacle preventing the proof from being produced. After voluntarily withholding what the party could give by way of evidence, no case will ordinarily arise for again opening the trial for a further hearing, and no legal ground for any such direction has been made to appear in support of this application. The authorities cited in support of the application for another trial of the action do not require it when the facts have already been settled by the hearing that has taken place, and they are left unchanged and undisturbed. The case presented then is the same as it would be upon a special verdict, finding all the facts proved by the evidence. That is what the referee has done by his report. And all that now remains is to direct judgment for the relief awarded by the law upon that state of facts. It is no more than a modification of the judgment by which it is changed from a judgment in favor of one party to a judgment in favor of the other. And that modification the court has been authorized to make. Unlimited power of modification has been given by section 1317 of the Code of Civil Procedure, and it should be applied when all the facts have been fully settled and stated in the decision brought before the court, as they have been by the referee's report in this action. The motion should be denied, with costs.

DAVIS, P. J., and BRADY, J., concurred.

Welch agt. Gaffney.

NEW YORK CITY COURT

WELCH agt. GAFFNEY.

Costs — When official assignee required to give security for — Code of Civil Procedure, sections 3268-3271.

Where an official assignee of a debtor sues upon a cause of action arising "before the assignment," he may be required by the defendant as of right to give security for costs.

Special Term, December, 1884.

MOADAM, J. — Where an official assignee of a debtor sues upon a cause of action arising "before the assignment," he may be required by the defendant as of right to give security for costs (*Code, sec. 3268*). Where the cause of action comes to the assignee "subsequent" to the assignment, it is discretionary with the court whether it will require the plaintiff to give security or not (*Code, sec. 3271*). This is the feature which distinguishes these two sections. If for example the defendant had bought goods from the assignee "subsequent" to the assignment, or if he had taken property from the assignee's possession, the case would have been brought under the provisions of section 3271 (*supra*). In the present instance the cause of action arose "prior" to the assignment, and the assignee must give security for costs.

Engel agt. Fischer.

N. Y. SUPERIOR COURT.

CHARLES ENGEL, appellant, agt. J. H. FISCHER, respondent.

Statute of Limitations — When statute begins to run in favor of a debtor who comes into the state under an assumed name — Code of Civil Procedure, section 401.

The Statute of Limitations will not run in favor of a debtor who comes into the state under an assumed name and continues therein under such assumed name, with the intent to conceal himself from his creditors until the creditor acquires knowledge of the debtor's presence within the State.

General Term, December, 1884.

Before VAN VORST and FREEDMAN, JJ.

B. Lewinson, for appellant.

W. & S. W. Fullerton, for respondent.

BY THE COURT (VAN VORST, J.). — The defendant, residing in Austria, in the month of May, 1873, incurred the obligation as acceptor of the draft which is the subject of this action. In July, 1873, the defendant absconded from Austria and came to the city of New York, and "for the purpose of concealing himself from his creditors assumed a fictitious name, and has ever since borne and been hiding under such fictitious name." The draft matured after the defendant took up his residence in New York. In April, 1882, the plaintiff, the owner of the draft, discovered defendant in the city of New York, living under his fictitious name, and demanded payment, which, being refused, he commenced this action.

Upon the trial the plaintiff's complaint was dismissed upon the ground that the action not having been commenced within x years after the cause thereof accrued, the same is barred by the Statute of Limitations.

The question arises whether the defendant was within the state during the period in question in the sense contemplated

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by the statute. It has been said that the Statute of Limitations "is a shield, and not a weapon of offense." I am quite sure that it was not designed to defeat justice. It should not shelter a man who, designing to defeat the vigilance of his creditors, comes into this State and conceals himself under a fictitious name, thus doing all in his power to prevent his creditors from reaching and prosecuting him within the time limited. In the construction of statutes the judge is vested with authority to disregard the letter in order, in a given case, to attain the ends of justice. This power has been repeatedly asserted and practiced upon by the highest authority (*Lieber's Hermeneutics* [3d ed.], note, page 285, and cases cited).

If this defendant is shielded by the strict letter of the statute, he is certainly not by its true spirit and intent (*Code, sec. 401*).

In decisions with respect to the former Statutes of Limitations, the word "return," found in the section above cited, has been held to apply as well to a person coming from abroad, where he had resided, as to a citizen of this state going abroad for a time and then returning (*Fowler agt. Hunt*, 10 *Johns.*, 464).

It has also been decided that the return must not be clandestine and with the intent to defraud creditors. The "return" must be public and under such circumstances as to give the creditors an opportunity, by the use of ordinary diligence and due means, to prosecute the debtor (*Cole agt. Jessup*, 10 *N. Y.*, 96, 103; *Randall agt. Wilkins*, 4 *Den.*, 577; *Ford agt. Babcock*, 2 *Sand.*, 518; *Fowler agt. Bailey*, 3 *Mass.*, 201; *Little agt. Blunt*, 33 *Mass.*, 359).

A coming into this state with the design of continuing therein, concealed under a fictitious name to avoid the pursuit of creditors, is in legal effect no coming at all until the day that he is discovered. The construction contended for by the respondent would make this statute, which was designed to prevent fraud, "the means by which it is made successful and secure."

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The case of *Poillon agt. Lawrence* (77 N. Y., 207), which arose under the bankrupt law, has some analogy. In that case the bankrupt contracted a debt in one name, and obtained a discharge under a different name, designedly omitting in his proceedings reference to any fact which would disclose that he was the same person who was the debtor to the plaintiff. RAPALLO, J., said: "It can hardly be supposed that any court would willingly sanction a fraud of that description."

Practically this defendant perpetrated a fraud equally obnoxious. Contracting a debt in a foreign country under his true name, he then comes to this country and lives under an assumed name, in this way to conceal himself from his creditors. Under such circumstances he cannot claim the protection of the Statute of Limitations.

Troup agt. Smith (20 Johns., 32), and other cases cited by respondent's counsel, involve the question of a fraudulent concealment of the cause of action, but not of the person of the defendant; that is a wholly different question.

The judgment below is reversed and a new trial ordered, with costs to abide the event.

COURT OF OYER AND TERMINER.

THE PEOPLE agt. IRA C. BELLOWES.

Criminal trial—Bill of particulars—When copy of evidence before grand jury should be furnished accused.

A copy of the evidence before the grand jury upon which indictments were found should be furnished the accused when necessity therefor is shown to enable him to prepare for trial, and the matter is one resting in the discretion of the court.

Where the statements in an indictment are sufficiently definite to advise defendant of the charge against him he is not entitled to any further particulars.

Where the counts for an offense such as grand larceny are so general and embrace so many subjects of larceny that they do not advise the defend-

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ant with sufficient distinctness of the charge in each against him, the sums stolen, upon the proof of which the people rely, should be particularly stated so that defendant may be advised of the precise charges under the counts relating to the crime, and thus be enabled to prepare to meet them.

New York, February, 1884.

BRADY, J.—The defendant moved at the court of oyer and terminer that he be furnished with a bill of particulars in relation to the several indictments found against him and for a copy of the minutes of the grand jury or permission to inspect the same through his counsel. The application rests upon the affidavit of the latter stating that it would be unsafe for him to proceed to trial, and that he could not make the necessary preparation for a complete defense unless furnished with such bill of particulars and a copy of the minutes of the grand jury.

I have not the time to give more than a general statement of the reasons which led to the conclusions which I am about to state, and, therefore, give little more than the result only of my examination of the application.

In the case of *Eighmy agt. The People* (79 N. Y., 546, see p. 560) it was declared that the refusal of the court to compel the public prosecutor to furnish the prisoner's counsel with the evidence before the grand jury was a matter resting in the discretion of the court, and was not the subject of review upon writ of error. The necessity for a copy of the minutes in this case is not, I think, sufficiently shown by the affidavit of counsel. I entertain the opinion, however, that in some respects the particulars which he seeks to obtain for the benefit of his client should be given if the indictments in the form in which they now exist are to be pressed on all the counts contained in them of embezzlement and grand larceny.

The statement of the embezzlements is sufficiently definite to advise the defendant of the charge made against him, and therefore as to them he is not entitled to any further particu

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lars. In relation, however, to the counts for grand larceny it must be said that they are so general, and embrace so many subjects of larceny, that they do not advise the defendant with sufficient distinctness of the charge in each made against him. Each of them is, in my judgment, altogether too indefinite in its character. The defendant should be advised of the accusation against him, with sufficient certainty to enable him to prepare for his defense. There is no good reason why such a requirement should not be enforced. Each person accused of crime should be given the benefit of every reasonable opportunity to prepare for his defense, and to prove his innocence. The law is not seeking victims, but criminals, and every man until he is proved to be guilty is presumed to be innocent. If, for example, a person is charged with appropriating a check belonging to another, and its proceeds, and desires it, a copy of the check should be given to him. If he is charged with stealing a sum of money, inasmuch as the public prosecutor knows what sum he is accused of having stolen, unless it is stated in such a way in the indictment as to advise him clearly of it, he should, on application, be fully informed so as to enable him to prepare for his defense.

The Code of Criminal Procedure by the sections relating to the form of an indictment (*secs. 275, 276*) declare that there shall be a plain and concise statement of the act, stating the crime without unnecessary repetition. And this is in conformity to a very plain and just proposition, which is when a man is charged with the commission of an offense, he should be so advised of it that he may understand it, and what preparation is necessary to make and establish his innocence, if he can do it, and this rule applies more particularly to a case like this in which the defendant was not taken before a magistrate in the first instance where he would be entitled to a hearing, and, therefore, to a perfect exposition of the charge made against him.

For these reasons, briefly stated, I think, in reference to the charges of embezzlement, no further particulars are necessary,

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although in regard to the check alluded to in one of them, a copy should be furnished, if desired by the defendant; and as to the charges of grand larceny the sums stolen, upon proof of which the people rely, should be particularly stated, so that the defendant may be advised of the precise charges under the counts relating to the crime and thus be enabled to prepare to meet them.

Enter order to the effect directed.

SUPREME COURT.

OLE KNUDSON agt. MATUSKA & CRAIG FURNITURE COMPANY.

SEMON BACHE *et al.* agt. THE SAME.

Attachment — What must be shown by junior attaching creditor on motion to vacate a prior attachment.

To sustain an application of one claiming a lien as a junior attaching creditor to vacate a prior attachment, it is necessary for him to establish by legal evidence a subsequent valid levy under his attachment upon the same property covered by the prior attachment.

Where, upon such an application, an affidavit is made by the managing clerk in the office of the attorney for the junior attaching creditor, in which affidavit such clerk, referring to the levying of the prior attachment, states that thereafter, on the 2d day of December, 1884, an attachment was issued in the second action against the property of said defendant to said sheriff, through his deputy, levied on the 3d day of December, 1884, upon the same property theretofore levied upon by him under the attachment in the first action, "as I am informed and verily believe." He then goes on to state that the facts herein recited were obtained from Thomas Brady, the deputy sheriff having charge of and who made said levies, and that the reason why an affidavit is not produced from said deputy is that while he admitted that the statements regarding the facts recited herein are true he is unwilling to make the affidavit:

Held, that this affidavit is insufficient to show that the junior attaching creditor has a good and valid lien upon the property attached, enabling him to attack and vacate the attachment issued in the former suit.

Knudson agt. Matuska & Craig Furniture Company.

Special Term, February, 1885.

LAWRENCE, J.—This is a motion made by Bache, a prior attaching creditor, to vacate the attachment heretofore granted in the case of Ole Knudson against the defendant. It was held by the court of appeals in the case of *Tim agt. Smith* (93 *N. Y. Rep.*, 87), that to sustain an application by one claiming a lien as a junior attaching creditor to vacate a prior attachment, it is necessary for him to establish by legal evidence a subsequent valid levy under his attachment upon the same property covered by the prior attachment, and that the opinion of the attorney for the party making such application that the subsequent lien has been secured, although put in the form of an affidavit, is not sufficient. In this case the affidavit is made by the managing clerk in the office of the attorney for the junior attaching creditor Bache, in which affidavit such clerk, referring to the levying of the prior attachment, states that thereafter on the 2d day of December, 1884, an attachment was issued in the second above entitled action against the property of said defendant, the Matuska & Craig Furniture Company, to said sheriff; that said sheriff, through his deputy, levied, on the 3d day of December, 1884, upon the same property theretofore levied upon by him under the attachment in the first above entitled action, "as I am informed and verily believe." He then goes on to state that the facts herein recited were obtained from Thomas Brady, the deputy sheriff having charge of and who made said levies, and that the reason why an affidavit is not produced from said deputy is, that while he admitted that the statements regarding the facts recited herein are true, he is unwilling to make the affidavit. I do not think that this affidavit sufficiently shows that Bache, the junior attaching creditor, has a good and valid lien upon the property attached, enabling him to attack and vacate the attachment issued in the suit of Knudson (*See Tim agt. Smith*, 93 *N. Y.*, 87). The affidavit of the managing clerk does not, in my opinion, furnish proof that a

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lien has been established by Bache. His affidavit proceeds upon the theory that the admission made by the deputy sheriff is true, and it is sought to excuse the failure of the moving party to produce the affidavit of the deputy sheriff, showing precisely what the deputy sheriff did under the second attachment, by stating that he, the deputy sheriff, is unwilling to make an affidavit. The case of *Bennett agt. Edwards* (27 *Hun*, 352) is cited by the counsel for Bache as showing that the affidavit in this case is sufficient. But that case was a very different case from this. There a clerk of the defendant who had himself brought an action, and obtained an attachment, and who had positive knowledge of many facts and circumstances tending to show an intent to cheat and defraud the creditors, was requested by the attorney for the plaintiff to make an affidavit stating the facts as stated in his own affidavit, but he refused. The court there said, "he was seeking to secure his own claim, and did not care to have it embarrassed by others. Under these circumstances, we think the plaintiff should be excused from procuring an affidavit from Smith. The affidavit already made by him is on file in the office of the clerk of the county, and the person making the affidavit upon which the attachment was issued refers to such affidavit, quotes it in this affidavit and states that to be the source of his information, and that he verily believes it to be true." It will be seen that in that case the party from whom the information was derived had already made an affidavit as to the facts in his own case, which affidavit was on file and could readily be examined. In this case the clerk who makes the affidavit knows nothing of the circumstances, and relies upon the alleged admission made to him by the deputy sheriff. I do not think that such a state of facts excuses a failure to comply with the general rule, which is that the facts upon which an attachment is obtained should be stated upon positive knowledge, but that when from the circumstances of the case they cannot be so stated, they may be stated upon information and belief, giving the names of the

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persons and of the sources from which the information is derived, and the reasons why the affidavits of those having positive knowledge cannot be procured. In that case, too, there had been a positive refusal by Smith to make an affidavit. In this case it is simply stated that the deputy sheriff is unwilling to make an affidavit. In that case, also, there was a sworn statement as to the material facts by a person having knowledge of them, which sworn statement the party applying for the attachment also swore he believed to be true. In this case we have nothing but an alleged admission by the deputy sheriff. We have no affidavit as to the facts. Whether the admission of the sheriff was of the force and effect sworn to by the managing clerk, we have no means of ascertaining. Not a single fact stated by the deputy sheriff in making the alleged admission is put before the court. The attachment rests, therefore, upon the statement of the managing clerk that the deputy sheriff has made a certain admission. The court cannot determine whether that information is correct or incorrect. Under the rule laid down in *Tim agt. Smith* (93 *N. Y.*, 87, *supra*), and in the same case (65 *How. P. R.*, 199), I am of the opinion that Bache has not put himself in a position to attack the validity of the prior attachment in the case of Knudson against the same defendant. For these reasons it is unnecessary to examine the numerous other questions which were discussed upon the argument, and I am of the opinion that the motion to vacate the attachment should be denied, with costs.

Brainerd agt. White.

N. Y. SUPERIOR COURT.

ERASTUS BRAINERD agt. MARTHA WHITE, impleaded, etc.

*Married women — Liability of — How judgment to be rendered against —
Code of Civil Procedure, sections 450-1206.*

It was the intention of the legislature, evinced by sections 450 and 1206 of the Code of Civil Procedure, that proceedings to enforce a liability of a married woman shall be the same as if she was unmarried, and that all distinctions between a *feme sole* and a *feme covert* as to the form of the judgment to be entered is abolished.

The judgment in an action against a married women, by section 1206 of the Code, is to be rendered and enforced as if she was single.

In a suit against a married woman upon her promissory note, in which she charged her separate estate with the payment thereof, the plaintiff is entitled to a simple money judgment only.

*Special Term, January, 1885.**Henry Arden, for plaintiff.**Cephas Brainerd, for defendant.*

INGRAHAM, J. — The complaint in this action alleges that the defendant White, a married woman, made her certain promissory note in writing, whereby she promised to pay to defendant Manifold \$515, and charged her separate estate with the payment thereof, and delivered same to said payee in payment of an indebtedness for material furnished for work performed on defendant White's separate estate; that the defendant White was the owner of certain real estate in the city of New York, particularly described in said complaint, and demands judgment against defendants for the amount of the note; that said real estate be charged with the payment thereof, and that the same is a lien thereon.

Plaintiff at the time of the filing of the complaint in this action, viz., 28th of July, 1881, filed with the clerk of the city and county of New York a notice of the pendency of this action, describing the property mentioned in the complaint.

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That the plaintiff is entitled to judgment against the defendant White for the amount of the note is not disputed, but plaintiff also asks for a judgment that the real estate described in the complaint and notice of pendency of action be charged with the payment of the note, and that the same is a lien thereon, and to this judgment the defendant objects.

Chapter 90 of the Laws of 1860, as amended by chapter 172 of the Laws of 1862, was repealed by section 36 of chapter 245 of the Laws of 1880, page 371, and the regulation of actions by and against married woman are regulated by the Code of Civil Procedure.

Section 450 of the Code provides: "In an action or special proceeding a married woman appears, prosecutes or defends alone or joined with other parties as if she was single," and section 1206 provides "that a judgment for or against a married woman may be rendered and enforced in a court of record or not of record as if she was single."

Taking these two sections together, I am of the opinion that it was the intention of the legislature that proceedings to enforce a liability of a married woman shall be the same as if she was unmarried, and that all distinctions between a *feme sole* and a *feme covert* as to the form of the judgment to be entered is abolished.

In *Gerald agt. Quam* (10 Abb. N. C., 31), in construing section 450, it was held that the effect of the section was to eliminate the element of coverture from all actions, and to put the wife on the footing of a single woman; and this case was followed by the city court of Brooklyn in *Trebing agt. Vetter* (12 Abb. N. C., p. 302, note); and although the court has refused to follow those cases in *Muser agt. Lewis* (50 Supr. Ct., 431), so far as to hold that the Code does relieve the husband from liability for the torts of the wife, it was on the ground that by the common law the husband was liable for the torts of his wife, and as the court of appeals held in *Bertles agt. Nenau* (92 N. Y., 152, and cases there cited), that the rules of the common law remain in full force except to

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the extent that they are clearly annulled by statute, and that, as no statute has in express terms annulled the husband's liability, the liability still continues.

The judgment in an action against a married woman, by section 1206 of the Code, is to be rendered and enforced as if she was single. If the defendant White was a single woman, it could not be claimed that plaintiff would be entitled to the judgment asked in the complaint. He would be entitled to a simple money judgment against the defendant, and that is the judgment he is entitled to in this action.

The decision of the general term in this action on the motion to cancel the *lis pendens* was not on the ground that the plaintiff could maintain the action, but that the court would not try the issue on such a motion (see opinion general term, reported in 48 *Superior Court Reports*).

Whether or not plaintiff would have been entitled to the judgment asked for before the passage of the Code of Civil Procedure, I am of the opinion that under the Code the only judgment that can be given against a married woman is the judgment that would be given against her if single, and that plaintiff is therefore entitled to a judgment against defendant for the amount of the note and interest with costs, but is not entitled to the remainder of the relief.

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SUPREME COURT.

GEORGE F. VIETOR and others, respondent, agt. MOSES
HENLEIN and others, appellant.

Attachment—Acts which amount to fraud—When statements made to mercantile agency fraudulent—Motion to vacate attachment, how must be made—When may be opposed by new proofs—Code of Civil Procedure, section 688—Unlawful appropriation of firm assets which entitles creditors to an attachment.

Where an attachment was granted upon an allegation that defendants were indebted to plaintiffs for the price of goods sold and delivered, and that defendants had assigned, disposed of and secreted their property, with intent to defraud their creditors, and defendants controverted these grounds by averring that the goods had been sold upon a credit which had not expired, it was competent for plaintiffs to establish by answering affidavits the existence of the indebtedness by showing that the purchase-price had become due because the debt had been fraudulently contracted.

Where it appeared that defendants, in June, represented to a mercantile agency that they had a surplus of over \$101,000 over their liabilities of \$85,000, on which statement, which had been communicated to plaintiffs, they relied in the sale and delivery of the goods, and defendants, in November following, made an assignment for the benefit of creditors, whereby it appeared they were then \$75,000 in debt over and above their assets, and they could not by their books account for the difference.

Held, that defendants must be presumed to have known that their statement to the agency was untruthful in the extreme, and that a credit obtained in that manner was fraudulent and not binding upon the creditors, who were entitled to commence their action at once.

Where it appeared that, before the general assignment by defendants, they had appropriated—notwithstanding their indebtedness of \$75,000 beyond their assets—a large sum for the payment of individual debts and for the support of themselves and their families, unless by means of their assignment they could secure an adjustment of their debts with their creditors at forty cents on the dollar:

Held, that this was an unlawful appropriation of the firm's assets; and though defendants may not have thereby positively intended to defraud their creditors, plaintiffs were entitled to an attachment against their property for the reason that they had disposed of a portion of it at least, with the intent to defraud their creditors.

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Plaintiffs had a right to disaffirm the last of a series of sales of goods when they discovered that the goods had been fraudulently obtained, without affecting their right to maintain an action for the recovery of the debt owing for the goods previously sold.

First Department, General Term, January, 1885.

Before DAVIS, P. J., BRADY and DANIELS, JJ.

APPEAL from orders of judge BARRETT, denying motions to vacate attachments. The court on the first hearing reversed the orders (*see* 67 *How.*, 486), but on November third granted an order for reargument and on January, 1885, the reargument was heard.

Blumensteil & Hirsch, for appellants.

James Dunne, for respondents.

DANIELS, J. — One of the grounds upon which the attachment was issued was, that the defendants had become indebted to the plaintiffs in the sum of \$12,000 and upwards upon the sale and delivery to them of goods and merchandise, and they were also charged with having assigned, disposed of and secreted their property with intent to defraud their creditors. The grounds for the attachment were controverted by the affidavits presented on behalf of the defendants. It was stated that the goods had been sold upon a credit of four months, which, at the time when the attachment was issued, had not expired; and to answer that statement affidavits were produced on behalf of the plaintiffs to establish the fact that the debt had been fraudulently contracted, and for that reason the defendants had deprived themselves of their right to insist upon the credit.

If the plaintiffs were right in the answer made to this objection, then the terms of the credit were not binding upon them, but they were at liberty to bring their action for the recovery of the purchase-price of their goods in the same manner as though no agreement for any period of credit had

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been made (*Wigand* agt. *Sichel*, 3 *Keyes*, 120; *Claflin* agt. *Taussig*, 7 *Hun*, 223; *Arnold* agt. *Shapiro*, 29 *Hun*, 478; *Nelson* agt. *Hyde*, 66 *Barb.*, 59). And as one of the grounds upon which the attachment was issued was that the defendants had become indebted to the plaintiffs for the price or value of the goods, the fact itself could be established in this manner in answer to the affidavit on the part of the defendants, that the term of credit had not expired when the action was commenced. For by section 683 of the Code of Civil Procedure, the application to discharge the attachment when it may be founded upon proof on the part of the defendants, may be opposed by new proof by affidavit on the part of the plaintiffs tending to sustain any ground for the attachment recited in the warrant. The existence of the indebtedness was one of the grounds so recited, and when that fact was assailed by affidavit on behalf of the defendants, the plaintiffs were entitled to meet and avoid it by showing the fact that the debt itself had become due notwithstanding the agreement made for the credit.

To prove that the debt had been fraudulently contracted, an affidavit was produced, made by Squire Wood, who was connected with the mercantile agency of Wood & Co., who stated that two of the defendants had given the agency information of the pecuniary affairs of their firm, for the purpose of having it communicated to their creditors and merchants with whom they were dealing, and the trade generally, and which was communicated to the plaintiffs as a means of enabling them to know the creditors of the defendants' firm, and as a guide to them in selling goods on credit to that firm. The time when the statement was made is given in the affidavit as the 19th of January, 1883. But that was evidently a mistake, for the affidavit itself contains a statement of what the two defendants related concerning a change made in their business in May, 1883, which could not have been made if the statement to the agency was communicated in the preceding month of January. The other affidavits relating to

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the time also show that it must have been in the month of June, and not in the month of January, which it was intended should have been stated in the affidavit. By this statement of their financial affairs, which may be assumed to have been made in June, 1883, it is stated that the two defendants represented that their stock on hand amounted to \$80,000; that they had outstanding \$75,000, cash in bank, \$11,000, making a total of \$166,000; that their liabilities were \$65,000, leaving a surplus amounting to the sum of \$101,000. And it was shown by the affidavits of one of the plaintiffs that this statement of the affairs of the defendants was communicated to them, and that they relied upon that in selling and delivering goods to the defendants on credit, for the price of which the action was commenced.

From the statement of their affairs in this manner the court is at liberty to presume, as the fact was set forth in the affidavit, that it was the intention of the defendants that this information should be communicated by the agency to the persons engaged in the trade in which the defendants were dealing. And that it was so communicated is shown by the affidavit of one of the plaintiffs, without contradiction, in the case. That this statement was made to the agency has been denied on the part of the defendants; but as they are in conflict in their statements with other affidavits made in the case, and as Wood was a disinterested witness, the probability of the truth of this denial is against the defendants, so much so as to justify the conclusion that Wood, whose agency had made and preserved a record of the information received, is the most reliable witness upon the subject. The agency had no interest either in misunderstanding or misstating the information, and there is no probability under the circumstances that it did either. It is more probable that the defendants intended to place an exaggerated and unwarrantably favorable state of their affairs on the books of the agency for the purpose of creating for themselves a credit with the persons with whom they expected to deal, that they were not entitled from their

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true financial situations to claim. The statement was made for persons dealing with them to act upon, and who might well be deceived by it to their prejudice if it should turn out not to be the truth.

When a statement of this nature may be untruthfully made, intending thereby to deceive persons intending to consult it and rely in their dealings upon it, the individuals making it may well be held liable to have perpetrated a fraud, and to have contracted debts created in reliance upon the statement by means of fraudulent misrepresentation. This point was considered in *Eaton, &c., Company agt. Avery* (83 N. Y., 31), where this view is maintained of the effect of information falsely given in the course of mercantile business through an agency of this description.

That this statement was not a truthful report of the financial condition of the defendants was clearly disclosed by the examination made of their books by persons selected by a committee of their creditors to make it, and the defendants themselves do not claim that they had this surplus at the time when the statement of their affairs was given to the agency. The books contained no such account of losses by the defendants between the time when the statement was made and the nineteenth of November following, when they made a general assignment for the benefit of their creditors, as would exhaust this surplus and leave them indebted in the sum appearing to be owed by them over and above all their assets at that time. By the statement which one of the defendants made in his affidavit, they seem to have been indebted at the time of their assignment, over and above their assets, in a sum exceeding \$75,000, which, according to their books of account, they could not by any possibility have incurred if they had \$101,000 surplus in June, 1883. The probability, supported by the examination made of their books, is that they not only did not have this surplus of \$101,000, but that they were at that time in an insolvent condition, actually owing a larger amount of indebtedness than their assets would pay to their creditors.

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They are presumed to have been conversant with the state of their financial affairs, as that was recorded in and presented by their books, and accordingly they must have been aware of the fact, when the statement was made to the agency, that it was untruthful in the extreme. And as it was so made to influence persons dealing with them in giving them credit for goods and merchandise sold, it follows that credit obtained in that manner was fraudulent, and not binding or operative upon the creditors. They were accordingly at liberty, without waiting for the expiration of the stipulated period of credit, to commence their action at once, as the plaintiffs did after the assignment had been made by the defendants, for the recovery of the indebtedness created in their favor. And this fact was a legal answer to the assertion of the credit itself by the defendants in support of their application to discharge the attachment.

In support of the position that the defendants had assigned and disposed of their property with intent to defraud their creditors, reliance was placed by the plaintiffs on two facts. These were that they had paid to Max Wolff a fictitious debt of \$13,754.91, and that they had together drawn from the firm the sum of \$12,061.81, to be appropriated to their own individual uses and benefit, and not to be passed to the assignee under the general assignment. While the books of the defendants contained no authentic account of the alleged indebtedness to Wolff, it was still made to appear that the firm was indebted to him in the amount he had received. There was therefore, although the payments made to Wolff were suspicious, no necessarily fraudulent disposition of the debtor's property in making that payment. But as to the amount drawn by themselves from the firm's assets the case was entirely different, for it was shown that this amount consisted of sums drawn by the different members of the defendants' firm. It is stated to have been admitted by Louis Wolff, in the presence of the other defendants, who made no denial of the admission at a meeting of the creditors, that the differ-

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ent sums aggregating this amount of \$12,061.81 had been drawn by the individual members of the firm to pay individual family debts, and to be devoted to the support and maintenance of their respective families during the time that should elapse between their failure and the date of effecting a settlement with their creditors. And if they effected such a settlement at forty cents on the dollar the money drawn out would be at the disposal of the creditors in part payment of the compromise, but if they did not, then the money withdrawn would be devoted to the support of their respective families. The affidavits made by the defendants in substance admitted that these sums of money had been drawn by them from the moneys of the firm previous to the execution and delivery of the assignment, and in case they failed to secure the compromise of their debts in this manner that they designed and intended to appropriate it to the uses and support of their families. They did not, however, concede the amount to be that stated on behalf of the plaintiffs, but averred it to amount in the aggregate to the sum of \$7,978.61. This difference was made up to the extent of \$3,083.20 by payments which Moses Henlein made to William Reichman, to whom he was individually indebted upon a loan. It was not denied that the sum alleged to have been received by him had not as a matter of fact been drawn from the assets of the firm, but to the extent of these two payments that he had become indebted to the person to whom they were made, and made the payments to extinguish that indebtedness. It was still a misappropriation of so much of the property of the firm, whose creditors were entitled to be benefited by it, drawn out by one of its members with the concurrence of the others, intending to and actually appropriating it to the payment of his own individual debts, and unauthorized by the condition in which this firm at that time was financially situated. According to the most favorable state of the case made by the defendants they individually took from the firm assets the sum of \$7,973.61 to be chiefly used and appropriated in the future

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for the support of themselves and their families, unless by means of their assignment and the proposal made by them they could secure an adjustment of their debts with their creditors at the rate of forty cents on the dollar. This was an unlawful appropriation of so much at least of the firm's property, and it cannot be legally excused by the circumstances that they may not have positively intended thereby to defraud their creditors, for the fact necessarily is to this extent that the creditors were defrauded by making this disposition of this sum of money which the law did not permit them to make in the financial condition in which their affairs appear to have been. If by the assignment itself they had directed the assignee to pay the members of this firm the respective amounts drawn by them it would have been clearly fraudulent and void upon its face, for the law will not permit insolvent debtors to reserve from their estate, when it may be assigned in this manner for the benefit of their creditors, anything more than the property exempt by statute from levy and sale under execution. That they did not give this direction in the assignment, but individually took the moneys themselves, rendered it no less an unlawful disposition of their property. It was taking from their assets this amount of money which the creditors were entitled to the benefit of in the adjustment of their debts, and within the authorities it was a fraudulent disposition of so much of their assets. It was property taken by them to be withheld from their creditors, unless in the single contingency they should be able to secure a compromise at the rate of forty cents on the dollar, and which they did not afterwards succeed in effecting. A point of this description was considered in *White* agt. *Fagan* (18 *N. Y. Weekly Dig.*, 358), where it was held that such an abstraction of property previous to and in contemplation of a general assignment for the benefit of creditors was fraudulent; and the same conclusion results from what was held in *Untermeyer* agt. *Hunter* (26 *Hun.*, 147), and *Talcott* agt. *Hess* (31 *Hun.*, 282), and *Schultz* agt. *Hoagland* (85 *N. Y.*, 464-468, 469).

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It has been supposed by the defendants' counsel that the case of *Sherrill, etc., Co. agt. Harwood* (39 *Hun*, 9), afforded some countenance for this conduct of the defendants. But that case differed so materially in its facts as not to be liable to this construction by any of its language. As the case has been presented, the plaintiffs were entitled to an attachment against the property of the defendants for the reason that they had disposed of a portion of it, at least, with the intent to defraud their creditors, and that conclusion is further confirmed by the entire omission of this sum of money from the inventory filed of the debtor's property.

In the action of Emil Oelberman and others against the same defendants, the attachment depended very much upon the same circumstances, except the affidavit of Henry Fry authenticating a statement made by the defendants to Dun & Co., in March, 1883, by which they represented themselves as owning a surplus over all their liabilities of \$105,000, which was reported to the plaintiffs and upon which they acted in selling the goods for the price of which their action was brought, and an attachment issued in it in their favor. And as the order in the preceding case should be affirmed, so likewise should the order from which the appeal in this action has been taken.

In the case of William E. Iselin and others against the same defendants, additional and further grounds in support of the allegation that the defendants had disposed of their property with the intent to defraud their creditors were charged, consisting of the fact that upon the examination of their books there appeared to be a deficiency in their merchandise unaccounted for, amounting to the sum of \$37,900.46. This was ascertained by charging them with the amount of goods admitted to have been on hand on the 1st of January, 1883, at the sum of \$85,000, purchases after that date amounting to \$291,550.53, and deducting therefrom the amount of their sales, which were shown by the books to be \$298,937.51, reduced by a profit of seven and one-half per cent, stated to

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have been its average amount, and adding the fixtures in the store. In that manner this deficiency was made to appear, and it was in no way satisfactorily explained by the defendants.

The accuracy of this statement was denied by Louis Wolff in the affidavit made by him. But upon the basis of the facts on which his denial was made, the balance of stock on hand would appear to be no more than the sum of \$42,095.99, which would be \$20,000 less than the \$62,132.87 stated to have passed into the hands of the assignee. This discrepancy establishes the fact that he was inaccurate in the statement made by him as to the amount of purchases and sales and stock on hand on the 1st of January, 1883. He also added that the statement made by him of the amount of goods on hand was from \$75,000 to \$85,000. But one of the accountants who examined the books and swore to the statement made, related it to have been from \$85,000 to \$90,000, and that in his estimate he had put it at the lower of these two amounts. He was also supported by the entries in the books kept by the defendants, and it is probable that he was right in the statements made by him that there was an apparent deficiency in the merchandise account amounting to the sum mentioned by him.

It was also stated in the cases that large payments had been made by the defendants to their friends and relatives, of debts whose existence was not authenticated by their books, and in that manner that the large balance of cash indicated by the books to have been \$79,456.60, and conceded by the defendant Wolff to have been \$71,565.35, was, with the payments made to Max Wolff and the moneys drawn out by the defendants themselves, so far reduced in amount that only \$1,461.90 was passed into the hands of the assignee. The payments complained of and admitted to have been made amounted to more than \$35,000. But as the debts themselves were reasonably maintained by the statements made on behalf of the defendants, those payments cannot be held to have been fraudulent, although they are decidedly suspicious, as they

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were made between the 5th and 17th of November, 1883, shortly before the making of this assignment.

These facts, together with those already stated to have been supported in favor of the applications, still further sustain the propriety of the directions given, and of that more especially applicable to this case, that the order from which the appeal has been taken should be affirmed.

The case of Otto Heinz and others against the same defendants differs from the others in the circumstance that they replevied a portion of their goods which had been sold and delivered to the defendants; and for that reason it has been further objected that they deprived themselves of the right to maintain an action upon the contract for the residue of the sales made by them. The action was brought for the price of the goods sold and delivered between the 17th of March and the 16th of November, 1883, while the goods replevied were sold and delivered on the 16th of November, 1883. This was a sale of a separate and distinct parcel of merchandise from all the others; and as that was but three days before the execution and delivery of the assignment, it was alleged that they had been procured by fraud, and legally authorized the plaintiffs to rescind that sale; and in that conclusion they were sustained by the facts which have been made to appear in the course of these proceedings. They might, it is true, have also rescinded preceding sales made by them. But the facts were probably not known to them at that time, on which that could have been done. They, therefore, elected merely to rescind the sale of the last lot of goods, and, as they were not connected with the preceding sales, rescinding that sale in no manner required them to disaffirm the other sales which had been previously made. They had the right to disaffirm the last sale when they discovered that the goods had been fraudulently obtained, without affecting their right to maintain an action for the recovery of the debt owing for the goods previously sold and delivered by them to the defendants. The case is not within the authorities relied upon in

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behalf of the defendants. They relate to entire and indivisible transactions, and hold the rule to be that the party deceived cannot disaffirm such transactions or sales in part and maintain an action for the residue as goods sold and delivered. There was no such partial rescission in this case, but it was entire as to the goods known to have been fraudulently obtained, and they consisted of a distinct and separate quantity purchased at a different time from those for the price of which the present action has been brought, and the plaintiffs could well rescind as to this parcel of goods and affirm the other sales and maintain an action for the recovery of the price. This right results from the well established legal rules affecting transactions of this description, and is supported by what was held by the courts in *Mattewan Co. agt. Bently* (12 Barb., 645); *Wheaton agt. Barber* (14 Barb., 594); as well as by the principle of the cases of *Wright agt. Pierce* (4 Hun, 351); *Morris agt. Rexford* (18 N. Y., 552); and *Bank of Beloit agt. Beal* (34 N. Y., 473).

In this case, as well as the others, the order from which the appeal has been taken should be affirmed, together with the usual costs and disbursements.

DAVIS, P. J., and BRADY, J., concurred in the result.

N. Y. SUPERIOR COURT.

DANIEL B. HALSTEAD agt. CHARLES C. DODGE and ANSON POND.

NELSON J. BOTSFORD agt. SAME DEFENDANTS.

Corporations — Actions against trustees to recover corporate debts as penalty for failure to file annual reports — Liability of — Laws of 1875, chapter 510 — Practice — Parties — Code of Civil Procedure, section 456.

Actions against trustees to recover corporate debts as penalty for failure to file annual reports, pursuant to chapter 510 of the Laws of 1875, are not excluded by nor included in section 456, of the Code of Civil Procedure.

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In such actions one, any number, or all of the trustees may be made parties, and it is no defense that one trustee has not been joined, affirming *Strong* agt. *Sprout* (4 *Daly*, 328), reversed on another point (53 *N. Y.*, 497), explaining *Quigley* agt. *Waller* (32 *N. Y. Supr. Ct.*, 175). The defendant who acts as trustee although he may not be legally elected or be a stockholder, is liable as to creditors for failure to file an annual report extending *Easterly* agt. *Barber* (65 *N. Y.*, 252), which held that a trustee under such circumstances was liable to a co-trustee for contribution.

It is immaterial if the defendant so act whether he is legally elected or whether he is a stockholder at all.

Although the by-laws prohibited the officer of the corporation from contracting a debt, yet the fact that the company received and accepted the benefits of the contract, estops the defendant from raising the defense.

General Term, December, 1884.

Before SEDGWICK, C. J., FREEDMAN and VAN VORST, JJ.

THIS action was brought against the defendants as two of the three trustees of the Pyrolusite Manganese Company to recover a debt of the corporation by reason of the failure of the trustees to file an annual report. The defendant Dodge demurred on the ground that the third trustee was not joined; but the court, in special term, overruled the demurrer as it did not appear that the third trustee existed and was within the jurisdiction of the court (*The case was reported* 65 *How. Pr.*, 145.)

This opinion was subsequently affirmed at the general term. The defendant Dodge then raised by answer the objection that there were three trustees and that the third trustee had not been joined. * * *

The case was tried before the late ex-judge BOSWORTH, who wrote the following opinion.

J. S. BOSWORTH, *Referee*.—Each of these actions is brought against the defendants as trustees of the "Pyrolusite Manganese Company," a manufacturing corporation, to recover the amount of a debt alleged to be owed by the corporation to the plaintiff.

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In each case it is sought to charge the defendants as such trustees, because the said corporation did not, within twenty days from the first of January, 1882, make and publish and file a report as required by law in such case made and provided, and also because the corporation has not since then made, published and filed such a report. These actions were commenced in March, 1883.

Some questions common to both actions will be first considered.

The defendant Dodge alleges in his answer in each action that one E. H. Woodward "at all the times alleged in the complaint was a co-trustee with this defendant of the Pyrolusite Manganese Company, and was, and is, a necessary party to this action." The defendant Pond has not set up this defense; his answer in each action consists of a general denial of the allegations of the complaint.

The defendants insist that as the statute makes the trustees jointly and severally liable, they must be sued separately or jointly; that by bringing an action against more than one trustee the plaintiff has elected to treat these as jointly liable, and that his complaint is fatally defective because he has not made all the trustees parties defendant.

The common-law rule that persons jointly and severally liable must all be made defendants, if more than those thus liable were sued, applied only to actions arising *ex contractu* (*Graham Pr.*, [2d ed.,] 91).

As to actions *ex delicto* the rule was different. In such a case the injured party could sue one, all, or any number of them (*Id.* 93, and cases there cited). Under the statute which subjects trustees to the liability here sought to be enforced, the liability is imposed for a neglect or omission to perform a duty which the statute enjoins. No right of recovery is based upon any contract, made or alleged to have been made by the trustees; it is based on their misconduct, for which, when established, they are subjected to a liability which the statute affixes as the penalty for such misconduct.

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I think, therefore, that this defense is unavailing (*Strong agt. Sproul*, 4 *Daly*, 326 ; *Quigley agt. Walter*, 2 *Sweeny*, 195).

It is objected on behalf of the defendant Pond that he was not at any time a trustee of the company. He was as matter of fact elected a trustee on the 12th of July, 1881. All the stockholders were represented at that meeting, and all the votes cast were in favor of such election. He was elected in the place of Pauline Woodward, whose resignation was presented at that meeting and accepted. Her resignation was in terms conditioned "to take effect after the legal election of the fourth trustee" named in contract, bearing date June 29, 1881, the word "legal" is interlined and is in a different ink from the residue of the written resignation, but when or by what authority it was inserted was not shown. By the articles of incorporation the business of the corporation was to be managed by three trustees. It does not appear that any appropriate action has been taken to make four the number of the trustees. It would seem from the evidence that A. T. Woodward was elected a trustee at the same time. The acting trustees at that time were Edward H. Woodward, the president, and the defendant Charles E. Dodge. After the election of Pond and of A. T. Woodward, there was in form four trustees. As Pond was elected trustee in place of Mrs. Woodward, there is some force, as I think, in the position that he was legally elected a trustee, unless the condition of Mrs. Woodward's resignation, as it was not literally and legally complied with, rendered such election a nullity. If she had resigned unconditionally, and Pond had thereafter been duly elected a trustee in her place, I do not see that the validity of his election could be questioned, merely because then or thereafter there was a fourth trustee elected, without such prior action having been taken as would be necessary to make the election of a fourth trustee legal.

Mrs. Woodward's resignation was in fact accepted, and Pond was elected as her successor. He then believed that he had been duly elected a trustee. About the 26th of June,

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1883, he formally resigned as trustee, and the five shares of the stock of the company which had stood in his name, from the time of his election as trustee, on the books of the company, was transferred to Charles C. Dodge, and on the evidence given, presumably at the request of Pond.

In the meantime Pond, though evidently paying but very little attention to the details of the company's business, did various acts as secretary of the company. As such secretary, he signed notices of proceedings had, and also certificates of the ownership of stock in the company. On or about the 3d day of June, 1882, Pond and Dodge "as trustees of the Pyrolusite Manganese Company," presented a petition to the supreme court, in which they prayed "for a final order, dissolving said corporation and appointing one or more receivers of its property, and for such other relief as may be just." That petition alleges "that the said petitioners are one-half in number of the trustees of the Pyrolusite Manganese Company." It was signed by Dodge and Pond, and verified by them on the 3d of June, 1882. In the verification they, each for himself, swore, "that the matters of fact stated in the foregoing petition and schedule thereto annexed are just and true, so far as he knows, or has the means of knowing."

On that petition the supreme court made an order, on the 5th of June, 1882, by which, among other things, it was "ordered that all persons interested in the said corporation show cause" (at a time and place named, before Horace C. Chittenden, appointed a referee for that purpose) "why the prayer of the petitioners should not be granted." On the 29th day of December, 1882, the defendant Pond was examined as a witness under this order of reference, and testified thus, viz. :

"Q. You are, or suppose yourself to be, one of the trustees?

A. I suppose myself to be; yes sir.

"Q. How many shares of stock do you own? A. Five shares."

The evidence justifies the conclusion that litigation on th

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orders, made on the petition, was going on at the time that Pond resigned his trusteeship, in June, 1883.

On the 17th of April, 1883, he attended a meeting of the trustees, at which time the trustees proposed a resolution, removing Edward H. Woodward from the office of president of the company, and elected Charles C. Dodge president. Pond voted for the resolution, stating at the time of so voting, according to his own testimony, "if I am a trustee I vote so and so." This being translated means, as I understand it, that he said when he voted, "if I am a trustee of this company I vote aye" (or in favor of the resolution). After the vote was taken a notice was sent to Woodward, and published in one or more newspapers, signed by Pond as secretary of the company, declaring that at a stated meeting of the board of trustees of the company then held, Woodward was removed from the office of president of the company, and that Dodge was elected the president. I think that Pond cannot claim exemption from the liability imposed by statute upon the trustees of such a corporation, on the ground, that, technically, his election was not legally valid. As a matter of fact he was in form elected a trustee by those who had the right to elect one, if there was a vacancy to be filled. He supposed then that he was legally elected, and there is no reason to doubt that those who voted for his election supposed it to be legal. Without imputing to him motives which I think do not exist, he must have believed when he verified the petition before referred to, that he was in fact a trustee legally elected. Besides continuing to prosecute that petition as such trustee up to the time of his resignation of the office, he acted as trustee at a meeting held in April, 1883, at which Woodward was removed from the office of president, and another person was appointed president of the company. Without his presence and action at the meeting there could be no pretense that the removal of Woodward from office was effected.

Easterly agt. Barber et al (65 N. Y., 252), was a contest between the plaintiff, who had acted as trustee (but claimed

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not to have been legally elected a trustee) and his co-trustees, to recover from these co-trustees the amount of a debt owing to the plaintiff by the corporation, of which they were such trustees, on the ground of the omission to make and file the report required by law. The court held (*Id.* 262), "that a person having voluntarily assumed the character of a trustee, shall not be permitted to deny, either as to his co-trustees or the *ceteris que trust*, that he held that character, or to disavow his acts in that capacity. Accordingly the failure to file the report in this case was the plaintiff's failure as well as that of his associates. They could only be held liable with him to a creditor who had been aggrieved by their conduct. The plaintiff has not been injured. The penalties of the statute were not given for his protection."

The logical conclusion to which this decision leads is that if his co-trustees should be compelled to pay debts owing by the company, because they had not made and filed such a report, that they could recover from him his alleged part of the sum which they had thus been compelled to pay. That being so, there would not seem to be any good reason why such creditors could not recover from him directly. The language of the opinion imputes that they would only be held liable with him to a creditor who had been aggrieved by their conduct. If he would be held liable with them, he would be held liable if sued separately.

The act of Pond in filing the petition previously mentioned, with a view to have the corporation dissolved and a receiver of it properly appointed, was an act of peculiar significance, without the allegation that he was a trustee of the company. The court would not have had jurisdiction to act on the petition. The object and intent of that proceeding was to take property of the company out of the hands and control of the persons elected by the stockholders to manage its business. The result sought would change the relations of each creditor of the company to it, and impose the necessity upon them to resorting to other remedies than such as they

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would have had so long as the corporation remained undissolved. It would seem to be fitting in such a case to carry the rule enunciated in *Easterly agt. Barber et al. (supra)*, so far as to hold that a trustee thus acting, although, perhaps, not legally elected, was liable to the creditors of the corporation who was such. While during his trusteeship there was a failure to make and file the report required by law, I think he must be held liable on any default to make and file a report between the time of his election as trustee and the time of his resignation of the office.

But it is further objected that Pond was not a stockholder. If this were so he would nevertheless be liable if the views above expressed are sound.

One acting as trustee cannot be held to be exempt from liability as trustee merely because he was not a stockholder. But I think he was a stockholder. On the books of the company he appeared to be the owner of five shares of the stock; certificate (No. 43) was filled up and signed. It was signed by the president and Pond as secretary of the company. This transfer of stock to him was doubtless made to satisfy the requirement of the statute that a trustee must be a stockholder.

Although the certificate was not detached from the books, it was within the control of Pond, and he was at liberty to do with it as he pleased. Whether he paid for the stock or it was given to him is of no consequence. The fact that the corporate seal was not affixed to it while the stock stood in his name did not prevent the title to it from resting on him. A person buying stock of the company or of the owner of it, who receives from the company a certificate of his ownership thereof, authenticated by the signatures of its appropriate officers, will become the owner of such stock although the officers may have omitted to affix to it the corporate seal.

It is further insisted that the question of liability of the trustees is to be determined by section 12 of the General Law, as amended by chapter 510 of the Laws of 1875

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(p. 589). That this section, as thus amended, provides first for corporations where the certificate of incorporation had been filed more than a year prior to the twentieth of January next, after the passage of the act, and requires but one report in such cases.

Next for corporations where certificate of incorporation might have been filed less than one year from the twentieth of January next, after the passage of the act, and as to the latter class, a certificate must be made and filed in each successive year. In the nature of things there is no reason why an annual report should be required in the latter class of cases which will not apply in equal force to the other class. Section 12 of the act of 1848 requires that "Every such company shall, annually, within twenty days from the first day of January, make a report, &c." This act would require a report from a company though not organized more than thirty days prior to the succeeding twentieth day of January. The change apparently intended to be made was to dispense with the necessity of a report until after the lapse of one year from the filing of the certificate of incorporation.

The section, as amended, read in connection with the section amended, imports to my mind a requirement that annual reports be made, specifies the time when the first report shall be made, and whether in obedience to this requirement. The first report required by this act shall be made in January, 1876, or in January, 1877. A further report must be made twenty days from the first day of January in each year thereafter. If these views are correct the only question left is whether in January, 1882, or January, 1883, the corporation was a debtor to each of the plaintiffs, and the amount of such debt. Pond was a trustee. No report was made in either of these years or before this action was commenced in March, 1883, or since then, so far as the evidence discloses. The debt of the corporation to Halstead between July 25, 1882, and December, both days inclusive, Halstead had loaned to the company from time to time moneys to be used, and in fact

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used, in the legitimate business of the company, and to pay its current expenses, amounting to \$4,313.40 over and above a payment of \$182.30, made on account of such loans. All of this indebtedness was due and payable as early as December 11, 1882, besides interest on each sum loaned from the time it was due and payable.

This debt, therefore, was contracted while Pond was a trustee, and was due before the time when the trustees should have made their report in January, 1883. On the 22d of March, 1883, at the time this action was commenced, there was due from the corporation to the plaintiff the sum of \$4,406.32. The only payment that has been made on account of it, as applicable to the reduction of it, was made since this action was commenced. The plaintiff, on his examination on the 11th of March, 1884, in answer to questions put by defendants' counsel, testified that since the commencement of these proceedings he has received \$613.45 on account of the loan — \$677.25.

The plaintiff's counsel objected to the reception of this evidence on the ground that it is "immaterial, irrelevant and not included in the pleadings." There is no plea of partial payment, and, for aught that appears, the fact did not exist so that it could be pleaded when the answers were put in. It is a fact which, as I think, the court would permit to be set up by supplemental answer; it is just, as I think, that it would be allowed. The plaintiff, as I think, should not, as a matter of right, recover a greater sum against the trustees than is owing by the corporation at the time of the recovery, though the indebtedness may have been larger at the time the action was commenced.

The plaintiff having said, after this evidence had been objected to, this, viz.: "I do not suppose that my counsel wish me to retain in my hands any money that belongs to this estate; I should have to give it to the representatives of that concern as soon as I got it."

I regard this as expressly the wish of the plaintiff that the

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referee should credit on this account whatever he thinks is a just credit, irrespective of the condition of the pleadings.

It is not clear on the whole testimony of the plaintiff that more than this sum should be allowed, as of the 11th of March, 1884, he had a debit and credit account with the corporation since the receipt of that item, and as the result of it is not stated, I allow the \$613.45 as a credit; this will leave due at the date of this report, from the corporation to the plaintiff, the sum of \$4,057.94, which sum the plaintiff is entitled to recover.

On appeal to the general term from this judgment entered on the report of the referee :

William D. Peck, John E. Ward and William Wheeler for the defendants and appellants, made and argued the following points :

First.—The statute makes all the trustees jointly and severally liable at common law. The plaintiff must sue each separately, or all together (*Deridder agt. Schermerhorn*, 10 Barb., 638; *Dean agt. Whiton*, 16 Hun, 203). The Code has not changed this rule except as to parties liable upon the same written instrument (*Code*, 448, 454; *Strong agt. Wheaton*, 38 Wheaton, 623). *Strong agt. Sproul*, holding to the contrary, was reversed (53 N. Y., 497). *Quigley agt. Walter* (2 Sweeny, 175), distinctly disavows the ground taken by the respondent.

Second.—The defendant Pond was not a stockholder nor legally elected as a trustee. Only *de jure* trustees are liable (*King agt. The Corporation, &c.*, 6 East, 368; *Craw agt. Easterly*, 4 Lansing, 513).

Third.—The president had no authority to borrow the money or make the contract. The by-laws provided to the contrary. There was no proof that the money was necessary for the legitimate business of the company; the only evidence being that it was used in the business of the company. This is insufficient.

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James B. Dill (Dill & Chandler), for the respondents, made and argued the following points:

First.—Section 456 of the Code applies only to actions on contract, and actions of this nature are not included in its provisions. The action is *ex delicto* (*Vernon agt. Palmer*, 43 *N. Y. Superior Ct.*, 256, and cases cited). The principle claimed by the appellant that in common law, where parties are jointly and severally liable, the plaintiff must sue one or sue all, is limited to actions *ex contractu* (1 *Chitty on Pleadings*, 97, 98; *Graham's Pr.*, [2d ed.], p. 91). As to actions *ex delicto*, a different rule prevails; one, all, or any number may be made defendants (*Graham's Pr.*, [2d ed.], p. 93). This distinction has been observed with respect to actions against trustees (*Strong agt. Sproul*, 4 *Daly*, 326; *Qnigley agt. Walter*, 32 *N. Y. Superior Ct.*, 175).

Second.—Pond assumed to act as a trustee in instituting a special proceeding in the supreme court to dissolve the corporation on the ground that he is a trustee. Whether he was legally elected a trustee, or was ever a stockholder, is immaterial; having assumed the position of a trustee *de facto* he is responsible as if a trustee *de jure* during the time in which he assumed to act (*Easterly agt. Barber*, 64 *N. Y.*, 262).

Third.—It was immaterial whether he was legally elected, or whether he was a stockholder *de facto*.

Fourth.—The fact that the corporation received the benefit of the contract, and in the case of *Halstead agt. Dodge* the money loaned the corporation was used in its business, would make the contract binding on the corporation (*Mead agt. Keeler*, 24 *Barb.*, 24). Hence the defendants are estopped as trustees from raising the defense (*Whitney Arms Co. agt. Barlow*, 63 *N. Y.*, 62).

The general term affirmed the judgment adopting the opinion of the referee below.

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A strict interpretation of the language just quoted would not authorize the award of commissions upon any assets of a decedent's estate, except such as had been theretofore actually reduced to money; but it has been repeatedly held that the provision should be so construed as to treat the reception of every variety of assets as a reception of money, and the application of such assets to the discharge of debts and legacies, to the establishment of trusts, &c., &c., as a paying out of moneys within the meaning of that expression in the statute (*Cairns* agt. *Chaubert*, 3 *Edw. Ch.*, 312; *Matter of De Peyster*, 4 *Sandf. Ch.*, 545; *Wagstaff* agt. *Lowerre*, 23 *Barb.*, 224; *Ogden* agt. *Murray*, 39 *N. Y.*, 302; *Ward* agt. *Ford*, 4 *Redf.*, 43; *Matter of Roosevelt*, 5 *Redf.*, 601).

In still another particular the statute above quoted has been liberally construed. Though in terms it seems to provide for the allowance of five, two and a-half and one per cent commissions upon such amounts, and such only as have been both received and paid out, the courts have frequently sanctioned the allowance of half commissions for receiving in advance of any paying out whatever. This practice seems to have obtained before the enactment of the present statute and under the rule in chancery established in conformity with the act of April 15, 1817. That act authorized the court of chancery, in the settlement of the accounts of guardians, executors and administrators, to make them a reasonable allowance for their services, and provided that when the rate of such allowance should be fixed by the chancellor, it should be conformed to in the settlement of such accounts.

This rate was subsequently established by an order of the court of chancery (3 *Johns. Ch. Rep.*, 631). It is in these words: "Ordered, that the allowance settled by the chancellor as a compensation for guardians, executors and administrators in the settlement of their accounts * * * for receiving and paying money shall be five per cent on all sums not exceeding \$1,000 for receiving and paying out the same," &c.

In 1838, after the enactment of the existing law, a report

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of one of the vice-chancellors came before chancellor WALWORTH for confirmation (*In Matter of Kellogg*, 7 Paige, 265). A guardian had received a legacy bequeathed to his ward, and after expending therefrom a small sum in the ward's benefit, had invested the remainder upon bond and mortgage. The report of the vice-chancellor had allowed the guardian on his first annual accounting commissions upon the entire estate, both for receiving and for paying out. This report was modified by the chancellor so as to allow the guardian one-half commissions for receiving the sum in question, and to disallow commissions upon the trust fund that still remained in the hands of the guardian.

"The statute," says the chancellor, "gives a certain allowance by way of commissions for receiving and paying out moneys by executors, guardians, &c., without specifying how much is to be allowed for receiving and how much for paying out the same. And it may sometimes happen upon a loss of the fund without any fault on the part of the guardian or other trustee, or upon a change of trustees, that the guardian or trustee may be entitled to compensation for one service and not for the other. In such cases the language of the statute must be construed with reference to the decision of chancellor KENT in *Matter of Roberts* (3 Johns. Ch. Rep., 43), where he first established the allowance to be made in conformity with the directions of the act of April, 1817; that is, one-half commissions for receiving and one-half for paying out the trust money."

There are many reported cases which similarly recognize the divisibility of the statutory allowance of commissions and the propriety of awarding, upon the settlement of accounts, commissions for receiving assets that still remain in the hands of the accounting party (*Ward agt. Ford*, *supra*; *Howes agt. Davis*, 4 Abb., 71; *Laytin agt. Davidson*, 95 N. Y., 263).

For an *express* determination of the precise question here presented, I have vainly ransacked the law reports of this state; but several of the decisions above cited seem to involve

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of necessity an *implied* determination that, in computing the one-half commissions for receiving such assets as formed a part of a decedent's estate at the day of his death and continue to form a part of it at the time of the accounting must be valued at the price they were worth in the market when they first came into the hands of the executor or trustee. For in the cases above cited two propositions are clearly established:

First. That commissions for the receiving and paying out of moneys may justly be claimed by executors, guardians, trustees, &c., who have received and paid out assets never actually converted into money.

Second. That an accounting executor, guardian, trustee, &c., may lawfully be granted commissions for receiving such property, even when the property so received remains in his hands precisely as it reached them.

It is a necessary corollary from these propositions that whenever, upon assets other than moneys, courts have allowed one-half commissions for receiving in advance of any paying out, such commissions have been computed upon estimated values that must, in many instances, have differed greatly from the values of such assets, as subsequently ascertained by actual sale, or as subsequently estimated in fixing the basis for computation of the one-half commissions for paying out.

It is evident, indeed, that when the trustees of this decedent's estate shall hereafter account for the very securities that are now the subject of consideration, if it shall chance that such securities still remain in their possession, and if they shall ask to be allowed commissions for receiving the same in advance of any paying out, it will be necessary, for the purpose of computing such commissions, to treat such securities as worth the exact amount of their market value at the time of their reception by the trustees.

What may ultimately prove to be their actual worth to the beneficiaries cannot now be determined. At some future day they may be converted into money. They may then have a value even higher than has been assigned to them in the

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inventory. On the other hand the proceeds of their sale may fall far short of the sum that could be obtained for them if they were to-day thrust upon the market.

It would seem, therefore, upon grounds quite apart from those that are furnished by the decisions to which I have referred, that the present value of the securities about to be delivered to the trustees is not the proper sum upon which to compute one-half commissions for receiving. Indeed, there seems to be no more reason for computing upon such a basis the commissions for receiving than there is for computing commissions for paying out upon the basis of the value of these securities when they first came into the hands of the executors. In adjusting commissions for receiving and paying out such assets of a decedent's estate as its executor has actually sold and converted into money before his accounting should be valued at the precise amount realized by their sale. When there has been a literal receiving and paying out of moneys, a literal obedience to the statute can be and should be observed. But assets that, at the time of the accounting, remain unsold, and that have not been applied to the discharge of debts or legacies, or otherwise used in the course of administration, may justly be taken, in the reckoning of what are sometimes called "receiving commissions," at their market value when received. And, analogously, whenever such assets shall have been "paid out," within the meaning of that expression in the statute, their value at the time of such paying out will afford the correct basis for calculating the remaining one-half commissions to which the representative of the estate will then have become entitled.

I have examined at random several accounts which for one cause or another have occasioned controversy in our appellate courts respecting the proper adjustment of the commissions of the representatives of decedents' estates. Each of those accounts seem to have been prepared upon the theory that I have here approved, and none of them were for that cause subjected to adverse criticism.

Gregory agt. McArdle *et al.*

For the foregoing reasons I hold that, in computing commissions upon the securities which formed a part of this estate when it came into the hands of the executors—which have since been retained by them in the exercise of the discretionary authority given them by the testator's will, and which they are now about to pass over to the trustees—the market value of such securities at the time they came into the hands of the executors must be taken as the basis for the one-half "receiving" commissions, and the one-half commissions for "paying out" must be computed upon the value of those securities at the time the decree shall be entered upon this accounting.

CITY COURT OF NEW YORK.

MATHEW H. GREGORY agt. PATRICK J. McARDLE *et al.*

Justice's court—Costs and jurisdiction—Costs when the mutual demand of both parties exceed \$100, and in which it is said a justice's court has no jurisdiction.

Where an action is brought in the city court of New York, and the plaintiff fails to recover over fifty dollars by reason of the allowance of a counter-claim pleaded and growing out of the same transaction alleged in the complaint, the defendant is entitled to costs.

General Term, April, 1884.

Before McADAM, C. J., NEHRBAS and HYATT, JJ.

APPEAL from an order made at special term affirming a taxation of costs in favor of the defendants.

BY THE COURT.—The counter-claim pleaded grew out of the same transaction alleged in the complaint and should have been credited thereon by the plaintiff, in which case the balance would have been thirty-six dollars and thirty-two cents, the amount of the verdict rendered herein. This

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balance would have been sued for in a justice's court, and hence the defendant is entitled to the costs, the plaintiff's recovery being under fifty dollars. *Montagu on Set-offs* (p. 12, published in 1848) says: "When there are opposite demands between two persons, and the accounts are connected by originating in the same transaction, the balance is the debt, and is the sum recoverable by suit." And on page five he adds this note: "*Barber agt. Brabam* (2 Blackst., 869; 3 Will. 3d; *H. T.*, 13 G., 111, appendix 8), BLACKSTONE, J., says, 'the courts have been gradually extending this equitable remedy. In the course of a suit they compel the plaintiff to make a set-off in the affidavit to hold to bail, and will not suffer him to swear to only one side of the account.'" The verdict found by the jury was for the balance due in this case, and if the plaintiff had given the defendant the proper credit instead of suing on "one side of the account" only, his attorney would probably have selected the "justices' court" as the proper tribunal in which to bring this action.

Under the circumstances the order appealed from must be affirmed, with costs.

SUPREME COURT.

JOHN L. SUTHERLAND, respondent, agt. ALONZO BRODNER,
impleaded with DAVID D. McNAIR, appellant.

Attachment—Application to vacate—On what papers it may be made and opposed—Code of Civil Procedure, section 683.

Upon a motion, founded on the papers upon which an attachment was granted, to vacate such attachment, the justice presiding permitted an affidavit made several days after the attachment to be filed *nunc pro tunc*, as of the prior date, and to be read in support of the process.

Held, that this ruling was erroneous, the paper not being one in any way connected with the granting of the attachment, and, therefore, was prohibited by section 683 of the Code from consideration when the motion to vacate was made.

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First Department, General Term, January, 1885.

Before DAVIS, P. J., BRADY and DANIELS, JJ.

APPEAL from an order, denying motion to vacate attachment upon the papers upon which it was granted.

Henry Thompson, for appellant.

Stephen P. Nash, for respondent.

BRADY, J.—The motion to vacate the attachment was founded upon the original affidavits; that is, those upon which it was granted. On the motion to vacate the learned justice presiding permitted an affidavit, made several days after the attachment was granted, to be read in support of the process. This could not be done under section 683 of the Code. Its language is clear and positive on that subject, and the court of last resort has so declared (*Steuben County Bank agt. Alberger*, 25 N. Y., 179-183). The attempt to overcome this statute law by the direction to file the subsequent affidavit *nunc pro tunc* as of the prior date was one to accomplish indirectly what could not be done directly. It is impossible even in these days of extraordinary inventions, of triumphs in ingenuity and skill, to say with truth that a paper not in existence at the time an attachment was granted formed a part of the proofs, and to satisfy the judicial mind that it should issue. It was not, in any view that can be presented of this appeal, a paper in any way connected with the granting of the attachment, and therefore was prohibited, as we have seen, from consideration when the motion was made.

Under these circumstances, the order appealed from must be reversed and the papers remitted to the special term for a proper hearing; ten dollars costs and disbursements of this appeal allowed to the appellants.

DAVIS, P. J., and DANIELS, J., concurred

New York, West Shore and Buffalo Railway Company agt. Thorne.

SUPREME COURT.

In the Matter of the Application of the NEW YORK, WEST SHORE AND BUFFALO RAILWAY COMPANY, appellant, agt. THOMAS P. THORNE, DWIGHT E. HEMINGWAY and others, respondents.

Railroads — Proceedings to take lands — Right of company to discontinue — Practice as to such discontinuance — Code of Civil Procedure, sections 1358-2240.

Where proceedings are instituted by a railroad company, under the laws of this state, to acquire title to land, and after a report by commissioners making their award, and before confirmation, the railroad company moves for leave to discontinue and abandon the proceedings, it is within the legitimate power of the court in granting it to annex such terms to go with the favor as, under the circumstances, justice and fairness to the parties require. The terms upon which the motion should be granted is within the discretion of the court.

While the provisions of the statute permitting extra allowance do not apply to special proceedings, and such allowance cannot be made under an order giving costs, but in such case the limitation to those for similar services, &c., in actions, controls, yet that restriction has no application on a motion for favor.

The court, in granting such motion, is not restricted to taxable costs and disbursements as a condition.

Fifth Department, General Term, October, 1884.

Before SMITH, P. J., BARKER, HAIGHT and BRADLEY, JJ.

APPEAL from order of Monroe special term confirming report of referee, &c.

On the petition of the appellant commissioners were appointed in February, 1883, to appraise the damages occasioned by the appropriation by the petitioner for its railway, ninety-nine feet in width, of certain lands of which Thorne was owner, and Hemingway & Co. were his tenants, engaged in the fruit and vegetable canning business. The commissioners heard the testimony and made report, awarding to Thorne \$3,500 and to the tenants \$2,200. Motion for con-

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firmation was denied by the court, with instruction to commissioners to make their report more specific. They convened and made another report, which the court refused to confirm, and directed the commissioners to ascertain and report other damages which the tenants would suffer in the premises.

The commissioners reconvened, further testimony was taken and they then awarded to Thorne \$3,500, and to Hemingway & Co. \$9,397. No motion was made for confirmation of that award, but the petitioner made a motion on 27th June, 1883, for leave to discontinue and abandon the proceedings, and an order was made by the court discontinuing the proceedings, without prejudice to the right of the petitioner to change the line of its road, and directing it to pay the respondents "their reasonable disbursements and counsel fees therein," and referred it to H. V. Howland to hear the proofs and determine the amount of such disbursements and counsel fees, to be paid by the petitioner. The parties appeared before the referee, gave testimony, and he reported that the reasonable disbursements of Thorne were \$40 00
 That those of Hemingway & Co. were..... 668 12
 That the reasonable counsel fees of Thorne were.. 700 00
 And those of Hemingway & Co..... 1,000 00

Making together..... \$2,408 12
 which, in his opinion, the petitioner should be required to pay.

At Monroe special term, January, 1884, an order was made denying the petitioner's motion to amend the order of June 27, 1883, so as to restrict the allowance to respondents to simply costs and disbursements, &c. And the respondent's motion to confirm the referee's report was granted by order made at the same term. From the latter order this appeal is taken, and a purpose expressed in the notice of appeal to bring up for review the intermediate orders referred to.

J. M. Davy, for appellants.

Brown & Garfield, for respondents.

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BRADLEY, J.—On confirmation of report of commissioners appointed, pursuant to statute, to appraise the damages or compensation to owners, &c., of land sought to be acquired by a railroad company for the purposes of its road, the rights of the parties became so fixed that the company could not discontinue or abandon the proceedings until the right was given by Laws of 1876, chapter 198 (*In re R. & C. R. R. Co.*, 67 N. Y., 242).

At any stage of the proceeding, prior to such confirmation, the company might do so, but this right was not absolute. The proceeding was in the court, and subject to its control in so far that it might deny or defeat the purpose to discontinue, and make it dependent on such conditions as to the court seemed reasonable. Hence it was usual to apply to the court for leave (*In re Anthony Street*, 20 Wendell, 618; *In re Commissioners Washington Park*, 56 N. Y., 144; *In re Waverly Water-Works*, 85 N. Y., 478; reversing 16 Hun, 57).

The reason and the rule in that respect are applicable alike to special proceedings and actions (*Carleton agt. Darcy*, 75 N. Y., 375; *Salmon agt. Gedney*, *id.* 482; *Brownell agt. Ruckman*, 85 N. Y., 648). It follows that the motion was properly made by the company for leave to discontinue the proceeding, and it was within the legitimate power of the court in granting it to annex such terms to go with the favor as under the circumstances justice and fairness to the respondents required.

To reimburse them for their reasonable and proper expenses in the proceeding was evidently the purpose of the court, and we cannot say that the order in that respect was not a fair exercise of discretion.

The amount of the disbursements and counsel fees, as ascertained and reported by the referee, was a large per centage of the amount involved in the proceedings; but by the testimony taken by him it appears to have been incurred, and not unreasonably. The respondents, Hemingway & Co., had, as they believed, large and important interests involved, which

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required and justified effort and expense, perhaps somewhat unusual.

While the provisions of the statute permitting extra allowance do not apply to special proceedings, and such allowance cannot be made under an order giving costs, in such case the limitation to those for similar services, &c., in actions controls (*Code Civ. Pro.*, sec. 3240; *R. and S. R. R. Co. agt. Davis*, 55 *N. Y.*, 145), that restriction has no application on a motion for favor (*Waverly Water Works*, 85 *N. Y.*, 478; *Brownell agt. Ruckman, Id.*, 648.)

The fact that at the time this motion was made the proceedings had not reached completion and no rights had vested under them in respect to the land or compensation, is not important for the purposes of the question here, nor is it important that the company might have entered an *ex parte* order of discontinuance without any application to the court, or do it by notice without order; if that be so (4 *Hun*, 313), that would not take from the court the power, upon motion, to assume control of the proceeding, and declare the discontinuance thus sought to be produced ineffectual, and restore it for the purposes of the proper protection of the other party to the proceeding (*Carleton agt. Darcy*, 75 *N. Y.*, 375). The determination of *Watson agt. New York, W. and B. Railway Company* gave nothing new to the rule or practice in such cases. There the discretion exercised by the special term was sustained and its order affirmed (30 *Hun*, 649). Upon the notice of appeal, the appellant is permitted to bring up the intermediate order for review (*Code of Civil Pro.*, sec. 1358).

But it may be questionable whether, after voluntarily proceeding under the order of discontinuance upon the terms there prescribed, and of the reference, and taking the benefits of the order, the appellant has not waived the right to review that order (*Arbdsell agt. Root*, 3 *Abb.*, 142; *Railway agt. Graham*, 4 *Abb.*, 468; *People agt. R. & S. L. R. R. Co.*, 15 *Hun*, 188; *Strong agt. Jones*, 25 *Hun*, 319).

In the view taken of the case it is unnecessary to determine

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that question and we do not give it consideration. The intermediate orders are within the properly exercised discretion of the special term; and the order confirming the report of the referee should be affirmed, with ten dollars costs and disbursements.

All concur.

SUPREME COURT.

LORENZO B. ROGERS agt. MUTUAL RESERVE FUND LIFE ASSOCIATION.

Assessment insurance — Lapsed certificate — Failure to present claim — Code of Civil Procedure, section 516 — Cases where the court may require a reply.

In an action against an assessment insurance company, brought by a beneficiary to recover on a certificate of membership, where the defendant's answer alleged new matter, *i. e.*, the making and non-payment of an assessment:

Held, that, under section 516 of the Code of Civil Procedure, on motion of defendant's counsel, the court will require the plaintiff to reply to the new matter set up in defendant's answer.

Brooklyn Special Term, February, 1885.

THIS action was brought to recover \$10,000 on a certificate of membership, issued to Edward B. Rogers by the "Mutual Reserve Fund Life Association," of New York. The plaintiff was beneficiary named in the certificate of membership. The defendant's answer alleged that by the terms of the application the constitution and by-laws of the association were made a part of the certificate, and that by the terms of the certificate and by the constitution and by-laws it was provided that if a member shall neglect to pay any dues or mortuary assessment for more than thirty days from the date of notice to pay, then the membership should at once cease and determine and the certificate be null and void, and that a notice addressed

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to the member's post-office address as appearing on the books of the association, and deposited in the post-office, postage paid, should be deemed a sufficient notice, and that the association will not be bound to recognize any claim unless such claim is made within six months after the date when it shall first arise.

Defendant moved, under section 516 of the Code, that the plaintiff be directed to reply to the new matter in the answer.

Taylor & Parker, for defendant. The new matter in the answer is the making and non-payment of an assessment, and also the failure to present claim within six months.

The plaintiff should be required to reply, in order that the defendant may be appraised of the issue it has to meet, and of the way in which plaintiff proposes to avoid the defense interposed, and in order that the issues may be narrowed and limited (*McGinn* agt. *Torrens*, 4 *Law Bulletin*, 29; *Brinkerhoff* agt. *Brinkerhoff*, 8 *Abb. N. C.*, 207; *Hubbel* agt. *Fowler*, 1 *Abb. [N. S.]*, 1; *Leslie* agt. *Leslie*, 11 *Abb. [N. S.]*, 314; *Poillon* agt. *Lawrence*, 43 *Supr. Ct.*, 385; *Argall* agt. *Jacobs*, 87 *N. Y.*, 114). The matter rests in discretion, and a reply should be ordered to avoid any surprise and to settle the issues before trial, and the case is a proper one for a reply.

P. Q. Eckerson, for plaintiff, claimed no reply should be ordered since plaintiff, before he can recover, must prove that he has performed all the conditions and requirements of the certificate.

BARTLETT, J. — Motion granted that plaintiff reply to new matter set up in defendant's answer.

NOTE. — The same point was decided before justice DYCKMAN, White Plains, October 1883, in *Nelson* agt. *M. R. F. L. A.* Before justice CHURCHILL, Syracuse special term, October 1883, *Hubbard* agt. *M. R. F. L. A.* — [ED.]

The People agt. Willett.

SUPREME COURT.

THE PEOPLE OF THE STATE OF NEW YORK agt. LOUIS
WILLETT.

*Criminal trial — Practice — Code of Criminal Procedure, sections 308, 527 —
When copy of stenographer's notes will be furnished prisoner's counsel at
expense of the county.*

Upon the arraignment of a prisoner without counsel the law (*Code of
Crim. Pro., sec. 308*) requires that "he must be asked if he desire the
aid of counsel, and if he does the court must assign counsel." The
duty of assigning counsel carries with it the power, and the further duty
to do whatever is necessary and proper to be done to enable the assigned
counsel to discharge the trust which the court has devolved upon him.
Where a prisoner is entirely unable to furnish the money to defray the
cost of transcribing the stenographer's notes, and counsel who have
been assigned for his defenses deposes that a proper discharge of the
duties devolved upon him by the court requires a presentation of the
case to the appellate tribunal, the court should provide the means
necessary to enable him to do that which the court has enjoined.
And in a proper case the court will upon motion in behalf of the prisoner
direct that a copy of the stenographer's notes of the trial be furnished
his counsel at the expense of the county.

Ulster Special Term, January, 1885.

MOTION in behalf of the prisoner that a copy of the
stenographer's notes of the trial be furnished at the expense
of the county.

William Lounsbury, for prisoner.

A. T. Clearwater, district attorney, for people.

WESTBROOK, J. — The prisoner who was convicted at a
court of oyer and terminer held in and for the county of
Ulster, on the 4th day of December, 1884, of the crime of
murder in the first degree, and who has appealed from such
conviction to the general term of this court, asks, as he
entirely without means, that a copy of the stenographer

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minutes be filed at the expense of the county, so that his counsel may prepare the bill of exceptions to present his case for review.

The ground of the motion is that the prisoner is entirely unable to furnish the money to defray the cost of transcribing the stenographer's notes, and therefore, as the counsel assigned for his defense deposes that a proper discharge of the duties devolved upon him by the court requires a presentation of the case to the appellate tribunal, the court should provide the means necessary to enable him to do that which the court has enjoined.

Upon the arraignment of a prisoner without counsel, the law (*Code of Criminal Procedure, sec. 308*) requires that "he must be asked if he desires the aid of counsel, and if he does the court must assign counsel." This embodies in the form of a statute what has always been the practice of the courts; and the duty of assigning counsel carries with it the power, and the further duty, to do whatever is necessary and proper to be done to enable the assigned counsel to discharge the trust which the court has devolved upon him. In pursuance thereof it has been the custom of courts to furnish means out of its contingent funds to procure witnesses necessary for the defense of persons accused of crime, and for other purposes connected therewith. No reason is seen why the principle of furnishing to counsel assigned to defend a prisoner the means he requires properly to discharge the work to which he has been assigned is not applicable to the present motion. The proper defense of a prisoner may often require a review of a trial upon which he has been convicted, and the prosecution of an appeal from a judgment of conviction may frequently be a duty devolving upon counsel as imperative in its character as the conduct of the trial. In this case the counsel who conducted the defense of the prisoner, not voluntarily, but by the command of the court, and of whose standing and character such command is evidence, states on oath that in his judgment the discharge of his duty requires

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a review of the conviction by appeal, and that the prisoner is entirely without money or means to procure a copy of the stenographer's notes of the trial. A denial of this motion would therefore be a denial in fact of his right to make the proper defense. Such a result is incompatible with an enlightened administration of justice, and of the policy of recent legislation in regard to capital cases. Formerly on conviction of a capital offense the death penalty, pending a review of the conviction, could be arrested only by the allowance of a writ of error, in the allowance of which the justice of the supreme court should give "an express direction therein that the same is to operate as a stay of proceedings on the judgment upon which such writ shall be brought" (2 *Edmund's Stat.*, 765, sec. 16). Now, however, it is expressly provided (*Code of Criminal Procedure*, sec. 527) that by the service of the notice of appeal to the supreme court from a judgment of conviction, "when the judgment is of death, the appeal stays the execution, of course, until the determination of the appeal." This provision is a clear indication of legislative intent. It was designed to give a prisoner convicted of murder the absolute right of review, and a stay pending the appeal. To make the enactment effectual in this case, this motion should be granted, for without the obtainment of the relief asked thereby the right of appeal and the stay are useless. The order will be that the clerk of the county procure at the expense of the county a copy of the stenographer's notes of the trial, which shall be filed in his office for the use of both the counsel of the prisoner and the district attorney in the preparation and settlement of the bill of exceptions.

It is proper to state in conclusion that judge PECKHAM, before whom the conviction was had, concurs with me in the propriety of the order hereby directed.

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SUPREME COURT.

FANNY B. HAIGHT agt. GILES S. BRISBIN, JAMES C. BRISBIN
and MORGAN B. MOE.

Executor — When liable for damages — Surrogate no jurisdiction in action to recover such damages — Practice — Code of Civil Procedure, sections 814, 2617, 2815, 2816, 2514, 2803, 2807, 2808, 2553, 2554, 2607, 2802, 2820.

An executor who is directed to sell real estate and invest the proceeds is liable for damages to the aggrieved party, unless he performs his duty faithfully, although the time and manner of sale is left to his discretion. In such a case the surrogate has no jurisdiction in an action or special proceeding to recover such damages.

Section 814 of the Code of Civil Procedure allows an action to be maintained in the name of the party interested against the sureties of such executors for such neglect of duty upon leave being granted by the supreme court.

Proceedings before the surrogate have not been prescribed for such a breach of the bond.

Saratoga Springs, Special Term, November, 1884.

DEMURRER to plaintiff's complaint.

E. Bullard, for plaintiff.

P. C. Ford, for defendants James C. Brisbin and Morgan B. Moe.

TAPPAN, J. — The complaint alleges that on or about September 17, 1871, Catherine S. Bailey died, leaving certain real estate in the village of Waterford, Saratoga county, particularly described, having on the 23d day of February, 1866, made her last will, which contained the following clause, viz. :

“ *Tenth.* I direct and empower my executors, hereinafter named, to sell and convey all the real estate of which I shall die seized, for the best price that can be obtained for the same, and at such time or times as shall in their judgment be for the best interest of all concerned, and the proceeds arising

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therefrom, together with the rest, residue and remainder of my personal property, and I give and bequeath to my said executors in trust as follows, the same to be by them safely invested and reinvested, and the interest and income arising therefrom to be by them annually, after the same shall be so invested, paid to my two said daughters, in equal proportions during their natural lives; that is to say, each of my said daughters shall receive one-half of said interest or income during her natural life, and upon the death of each of my said daughters the principal of which she shall have received or shall have been entitled to, interest or income aforesaid, shall be paid by my said executors to her then living children in equal proportions."

Said complaint further alleges that by said will defendant Giles S. Brisbin, William S. Haight and Isaac C. Ormsby were appointed executors, but neither said Ormsby or said Haight accepted such trust, but each renounced the same. The plaintiff, Fannie B. Haight, and Matilda S. Brisbin, wife of said Giles S. Brisbin, were the two daughters mentioned in the said will as aforesaid. That said will was duly proven and admitted to probate by the surrogate of Saratoga county, November 6, 1871, and said Giles duly accepted said trust and qualified as such executor under said will. That the said real estate above mentioned is mainly valuable for building purposes, and the same is not of much value for renting; and at no time since the death of said Catherine would it pay a net rent of three per cent upon its market value, or the price which it could be sold for; that said price and value has been decreasing ever since the death of said Catherine; of all which facts the said Giles had full knowledge. That said Giles neglected to sell said real estate as requested by the said plaintiff, and on the 4th day of November, 1882, the surrogate of Saratoga county upon her petition duly made and entered an order and decree, whereby it was decreed and determined that the circumstances of said Giles S. Brisbin were such that they did not afford adequate security to the persons interested,

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for the due administration of the estate of the said Bailey, and that he should within five days after service of a copy of such decree execute to the people of the state of New York and file with such surrogate the joint and several bond of himself and two or more sureties in the penalty of \$5,000 conditioned that he as executor and trustee under said will of said Bailey will faithfully discharge the trust reposed in him as such executor and trustee, and obey all lawful decrees and orders of the surrogate's court touching the administration of said estate. That after the service of said decree and on November 13, 1882, said defendants executed the bond required by said decree, and duly filed the same with the said surrogate, who thereupon omitted to remove or supercede said Giles as such executor or trustee, but allowed and permitted him to remain as such. The complaint further alleges that said Giles has been guilty of gross neglect and bad faith in failing to sell said real estate, and to invest the proceeds as required and directed by said will. That in consequence of such negligence said plaintiff has suffered damages to the amount of \$2,000.

That on September 8, 1884, an order was duly made by this court granting leave to plaintiff to bring and maintain an action in her own name for the breach of the condition of the said bond.

For a second cause of action plaintiff alleges that on or about July, 1883, plaintiff commenced an action in this court against the said Giles, as executor and trustee under said will, for neglecting to faithfully execute and discharge the trust reposed in him under said will; that the action was tried at a special term without a jury, and the defendants James C. Brisbin and Morgan B. Moe were requested to attend the trial thereof, and were notified that it would be insisted that said defendants would be bound and concluded by the judgment therein. That said defendants, such sureties, did not appear in such action. That afterwards, on the 7th day of August, 1884, a judgment was duly recovered in said action by the

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plaintiff against the defendant personally, for \$147 damages and \$152.52 costs, the roll of which judgment was filed and such judgment docketed in the clerk's office of Saratoga county on that day. That on or about August 27, 1884, an execution against the property of the defendant in that action, and against his property personally was duly issued and delivered to the sheriff of that county; that before the commencement of this action such execution was returned wholly unsatisfied, and such judgment remains wholly unsatisfied. Judgment is demanded against such defendants for \$2,000 with interest and costs.

The defendants James C. Brisbin and Morgan B. Moe demur to the complaint on the ground that it does not state facts to constitute a cause of action against them or either of them. The form of an administrator's bond is provided by section 2667, Code of Civil Procedure. An executor's bond should be in the same form (*McClellan's Surrogate's Ct.*, 344.) The bond set forth in the complaint is that of an executor and testamentary trustee; is in the same form as an executor's bond and was authorized by law (*Code Civ. Pro.*, secs. 2815, 2816). Plaintiff was one of the parties for the benefit of whom the bond was taken. After leave obtained from the court to prosecute, she could maintain an action in her own name thereon (*Code Civ. Pro.*, sec. 814).

The contention of the defendants upon the argument was that by the terms of the bond and the provisions of law an action cannot be maintained until the defendant Giles has been required to account before the surrogate, and a decree made in that court requiring him to pay a certain amount to plaintiff as executor and trustee, and execution issued against his property returned unsatisfied. Many cases are cited where actions have been brought against the sureties of administrators, executors and general and special guardians, under the law as it was before the Code of Civil Procedure went into effect, in which this contention was sustained. *Brown agt. Bulde* (3 *Lans.*, 283), and *Hood et al. agt. Hood et al.* (85

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N. Y., 561), are two of the more recent cases which decide the point involved. The condition of the bond is two-fold: First. That the defendant Giles will faithfully execute and discharge the trust reposed in him as executor and trustee under the will of Catherine S. Bailey, deceased; and, second. That he will obey all orders and decrees of the surrogate of Saratoga county touching the administration of the estate committed to him. Defendant Giles S. Brisbin is a testamentary trustee (*Code of Civil Pro.*, sec. 2514, sub. 6). Such trustee may be compelled to render an account in surrogate's court, upon the petition of any person interested in the estate or fund in his hands (*Code of Civil Pro.*, secs. 2803, 2807, 2808). The liability for all moneys belonging to the trust fund, which may have come to the hands of the trustee must be established by an accounting before the surrogate, a decree made determining the amount, an execution issued against the property of the trustee and returned wholly or in part unsatisfied, before there is a breach of the branch of the condition to obey all orders of the surrogate (*Code of Civil Pro.*, secs. 2553, 2554 and 2607; *Estate of Schofield*, 3 *Code of Civil Pro. R.*, 323). The first named portion of the condition wherein the defendants undertook that the defendant Giles S. Brisbin should faithfully execute and discharge the trust reposed in him as executor and trustee under the will of Catherine S. Bailey, deceased, is more comprehensive and is not controlled by the provision of the latter portion of the condition. It would seem that if there can be any breach of trust by the trustee, for which he could not be called to account in surrogate's court, such breach would be embraced within the condition of the bond, and an action could be maintained upon it therefor. I do not think the trustee could be called to account for gross neglect and bad faith in failing to sell the real estate and invest the proceeds therefrom as required and directed in said will, or that any decree could be made against him for damages arising from such a cause (*See tit. 6, art. 1, chap. 18, Code of Civil Pro.*, secs. 2802,

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2820; *Hulburt* agt. *Durant*, 88 *N. Y.*, 121; *Riggs* agt. *Craig*, 89 *id.*, 471; *Fiester* agt. *Shepard*, 92 *id.*, 251).

It is a general principle frequently decided by the courts, that contested claims cannot be litigated in surrogate's court. It has been held in some cases that where it was impossible to obtain a decree for breach of the condition of an executor's or trustee's bond, an action could be maintained for such breach without such decree, by an injured party. The defendants who are sureties are concluded by the judgment against their principal (*Douglass* agt. *Howland*, 24 *Wend.*, 35; *Jackson* agt. *Griswold*, 4 *Hill.*, 522; *Annett* agt. *Terry*, 35 *N. Y.*, 256; *Baggett* agt. *Boulger*, 2 *Duer*, 160; *Casoni* agt. *Gerome*, 58 *N. Y.*, 315; *Gerauld* agt. *Wilson*, 16 *Hun*, 530; *Hood* agt. *Hood*, 85 *N. Y.*, 578). The liability of the defendant Giles S. Brisbin has been established by the judgment of the court, upon which an execution has been returned unsatisfied. The sureties have had the benefit of substantially the same proceedings necessary to charge them for the failure of their principal to perform a decree of the surrogate (*See opinion in Hood* agt. *Hood*, 85 *N. Y.*, 575 and cases cited). The following cases are cited as showing special circumstances which authorize an action against sureties on bonds of an administrator, executor, trustee or guardian, without any action or proceeding against the principal (*Carow* agt. *Mowatt* [2d ed.], chap. 57, 62; *Williams* agt. *Kiernan*, 25 *Hun*, 355; *Haines* agt. *Mayer*, 25 *id.*, 414). Defendants have demurred to the whole complaint. If either count of the complaint is good, plaintiff should have judgment.

Judgment for plaintiff upon the demurrer.

Roosevelt and others agt. The Mayor of New York and others.

N. Y. SUPERIOR COURT.

THEODORE ROOSEVELT and others, agt. THE MAYOR OF NEW YORK and others,

Injunction—New York (city of)—When public bodies and public officers may be restrained from making corrupt appointments—Injunction should not be granted upon indefinite and uncertain allegations

A court of equity can restrain public bodies and public officers from making a corrupt appointment to an office to the prejudice of the public, and so to do is not controlling the discretion of a legislative body.

The power of appointing and confirming a commissioner of public works and corporation counsel of the city of New York is a trust conferred on the mayor and board of alderman, and the method of exercising this trust is subject to the control of the courts, which will interfere on sufficient allegations that such trust is about to be used corruptly or influenced by bribery, though the appointment might be legal, yet, if tainted by a charge of corruption or bribery, the court will have a right to interfere on that ground and restrain a breach of trust by injunction.

An injunction should not be granted on affidavits alone, and without a complaint.

In an action brought by the proper party, in which action sufficient facts are properly alleged, an injunction restraining an illegal or corrupt appointment to a public office may be issued.

Where as in this case the allegations that the mayor and aldermen were about to act corruptly were made on information and belief, the affiant not giving the sources of his information nor the grounds of his belief, and not stating who the persons were who were to be corruptly appointed and confirmed but referring to them by the vague appellation of "certain persons."

Held, that the allegations were too indefinite and uncertain to sustain an injunction. The mere allegation that there is a corrupt bargain and conspiracy, unless sustained by other facts, amounts to nothing, and is only a conclusion.

Special Term, December, 1884.

MOTION to continue the temporary injunction granted by judge BEACH, restraining the appointment by mayor Edson, and the confirmation by the board of aldermen, of a commissioner of public works and counsel to the corporation.

Roosevelt and others agt. The Mayor of New York and others.

Charles P. Miller, attorney and counsel for plaintiffs.

Sewell, Pierce & Sheldon, attorneys (*David Dudley Field* and *Robert Sewell*, of counsel) for defendants.

Among the privileges or franchises granted to the corporation of the city of New York by the state is the privilege of having certain officers, named in the charter, and among these officers are the commissioner of public works and the counsel to the corporation. The privilege of appointing is conferred by the charter upon the mayor of the city, while the right to confirm or reject the appointment is vested in the board of aldermen. This power of appointing and confirming is a trust conferred upon the mayor and the board of aldermen, and the method of using this trust is subject to the control of the courts. This trust is to be used for the benefit of the people of the city, each one of whom is a *cestui que trust*.

Section 101 of chapter 410, Laws 1882 (Consolidation act), declares that the common council and the several members thereof are trustees of the property, funds and effects of the said city, and makes such trustees subject to all the duties and responsibilities imposed by law on trustees.

It is to the prejudice of the citizens and of each citizen that an appointment to office is made through bribery, corruption or other unlawful means, for the law presumes that he who buys an office will make his purchase good to the manifest detriment of the public (2 *Blackstone's Com.*, 36, 37).

Section 58 of chapter 410, Laws 1882, provides that every member of the common council, or every person who shall promise, offer or give, or cause or aid or abet in causing to be promised, offered or given * * * to any member of the common council, or any officer of the corporation, * * * any money, goods, right in action or other property, or any thing of value, or any pecuniary advantage, present or prospective, with intent to influence his vote, opinion, judgment

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or action on any question * * * which may then be pending before him in his official capacity, shall be deemed guilty of a felony; and every officer who shall accept any such gift or promise * * * shall be deemed guilty of a felony, and shall upon conviction be disqualified from holding any public office, * * * and shall be punished by imprisonment or by a fine, or both.

Now, it is well settled that public bodies and public officers may be restrained from proceeding in violation of law to the prejudice of the public or to the injury of individual rights. A usurpation of power may by this process be prevented and an alienation or renunciation of a public franchise be forbidden and restrained. To the extent that public officers and public bodies are trustees either of franchises or property for the benefit of the public, they are amenable to the jurisdiction of courts of equity (*People agt. Canal Board*, 55 *N. Y.*, 390). In the exercise of this jurisdiction the court proceeds upon substantially the same principles as those which govern their interference in cases of trust; a municipal corporation being regarded in equity as charged with and made the depository of a public trust, and thus amenable to the jurisdiction of equity for a breach of that trust (*Christopher agt. Mayor, &c.*, 13 *Barb.*, 667; *Milbau agt. Sharp*, 15 *Barb.*, 193; *Stuyvesant agt. Pearsall, Id.*, 244; *Dudley agt. Trustees, &c.*, 12 *B. Mon.*, 615).

It was suggested on the argument that the appointment and confirmation were legal, and that it was the taking of bribes that was illegal, and that therefore only the bribe-taking should be enjoined. It seems to me that this distinction is not a just one, but that the appointing and confirming an officer through bribery and corruption are the illegal acts which may be enjoined. As long ago as *Fermor's case* (in the year 1602), it was said that the law doth so abhor fraud and covin, that all acts, as well judicial as others, and which of themselves are just and lawful, yet, being mixt with fraud and deceit, are in judgment of law wrongful and unlawful. ---

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It was contended on the argument that the act enjoined was a legislative act and discretionary, and therefore that the court had no jurisdiction to prohibit it. This court held in *Davis agt. Mayor, &c., of New York* (1 *Duer*, 495), that this contention is not true when applied to a subordinate municipal body, which, although clothed to some extent with legislative and even political powers, is yet, in the exercise of all its powers, just as subject to the authority and control of courts of justice to legal process, legal restraint and legal correction as any other body or person, natural or artificial. The supposition that there exists an important distinction, or any distinction whatever, between a municipal corporation and any other corporation aggregate, in respect to the power of the courts of justice over its proceedings, is entirely gratuitous, and is as destitute of reason as it is of authority. The conclusion from these remarks is, continues judge DUEK in the case above cited, that a court of equity will not interfere to control the exercise of a discretionary power, when the discretion is legally and honestly exercised, but will interfere whenever it has grounds for believing that its interference is necessary to prevent abuse, injustice or oppression in the violation of a trust or the consummation of a fraud. It will interfere and it is bound to interfere whenever it has reason to believe that those in whom the discretion is vested are prepared illegally, wantonly or corruptly to trample upon rights and sacrifice interests which they are specially bound to watch over and protect (1 *Duer*, 498), and the same ruling was made by judge GILBERT, in *Negus agt. City of Brooklyn* (62 *How.*, 291).

Judge DUEK then proceeded to consider whether the act of the common council in granting the right to lay a railroad track in the streets of this city was or was not a legislative act, and the conclusion that he arrived at is that it is not a legislative act. This is also the conclusion to which judge BOSWORTH came in the same case (*see* 1 *Duer*, 508), and is the conclusion arrived at by the court of appeals in *The*

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People ex rel. Davis agt. Sturtevant (9 N. Y., 273) and in *Milbau agt. Sharp* (27 *id.*, 611).

Now, if granting a franchise to a railroad company is not a legislative act, even though it takes the form of a resolution of the common council (9 N. Y., 273), how can it be said that confirming the mayor's appointment is a legislative act? Such power of confirming is not given to them by chapter 4 of the Consolidation Act, above referred to, which is the chapter that defines their legislative powers, but is given to them by chapter 5 of that act, which chapter defines the powers of the mayor of the city. The ordinances or resolutions of the board of aldermen (their legislative acts) must be approved by the mayor before they take effect (*sec. 75 of chap. 410, Laws 1882*), while such approval of the act of the board of aldermen in confirming or rejecting the mayor's appointments is not required. All that the board of aldermen is required to do is to give their consent (or refuse so to do). The act says that the mayor shall nominate and, by and with the consent of the board of aldermen, appoint the heads of departments (*Sec. 106*).

But, at any rate, the act of the mayor in nominating is not a legislative act, and if the act complained of is corrupt and fraudulent and an abuse of trust, it may be restrained by injunction (90 N. Y., 410) or set aside when made (*Eccise Case, 1 Lancaster Law Rev.*, 318).

I am of the opinion that in an action brought by the proper party, in which action sufficient facts are properly alleged, an injunction restraining an illegal or corrupt appointment to a public office may be issued. The action is brought by Theodore Roosevelt and others, but it is impossible to say on what grounds or under what statute the action is brought, because the complaint is not before the court.

The counsel for the plaintiff said on the argument that the action was brought under chapter 531, Laws 1881, and the bond given on obtaining the injunction is the bond required by that act; but there is nothing in the papers before me to

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compel the plaintiffs to allege the facts required by that act to maintain an action, or to prevent them from alleging any facts that they see fit to allege.

The right to an injunction in an action brought pursuant to this act must come under section 603 of the Code of Civil Procedure, which is in substance the same as the first clause of section 219 of the Code of Procedure. It has frequently been held that if such right was sought under the first clause of section 219, such right must appear upon the face of the complaint itself by necessary and proper averments; and it must likewise appear thereon that the plaintiff is entitled to a final injunction, and such injunction must be prayed for in due form (*Thompson on Prov. Rem.*, 206). This construction seems so have been applied to the present Code by the court of appeals in *McHenry agt. Jewett* (90 N. Y., 61, 62), where it is said that a temporary injunction is unauthorized when it does not appear from the face of the complaint that the plaintiff is entitled to the final relief for which the action is brought. Such fact cannot be said to appear on the complaint when there is no complaint. For this reason I cannot say that the action is brought under the act of 1881, nor can I look to the affidavits for facts to supply the deficiency of the complaint.

On the argument of the motion the counsel for the plaintiffs contended that section 628 of Code of Civil Procedure gave the court power to issue an injunction before the service of the complaint, and this construction was conceded to be right by one of the counsel for the defendants, though one of the counsel for the defendants denied it. Section 603 provides that where it appears from the complaint that the plaintiff demands and is entitled to a judgment against the defendant restraining the commission or continuance of an act, the commission or continuance of which, during the pendency of the action, would produce injury to the plaintiff, an injunction order may be granted to restrain it. In the action at bar the right to an injunction depends upon the nature of the action. The nature of the action can only be ascertained from the

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complaint, and the provisions of section 628, that the granting or denial of an application to vacate an injunction does not prejudice a subsequent application founded upon the failure of a complaint which had not been made at the time of the former application, to set forth a cause of action sufficient to entitle the plaintiff to the injunction order upon one or more grounds recited therein, means, if it means anything, that when an injunction has been granted, as provided by section 603, *i. e.*, on a complaint, and an amended complaint is served after granting or denying a motion to vacate it, such vacation of the injunction, or refusal to vacate, shall not prejudice another application for an injunction, or to vacate an injunction if the amended complaint sets forth, or does not set forth a cause of action sufficient to entitle the plaintiff to the injunction order. I am of the opinion that an injunction should not be granted on affidavits alone, and without a complaint, and for this reason the injunction herein should be vacated.

It is alleged in the affidavits on which the injunction was granted that the mayor of the city of New York is about to make certain nominations for certain offices, and that such nominations are about to be confirmed through a corrupt combination with the board of aldermen. These allegations are denied by some of the members of the board of aldermen. The mayor, however, has not denied them, and for this reason, whatever allegations against the mayor are contained in the moving papers are admitted. So far as he is concerned the only question is, are these allegations competent evidence? If these are not he is not bound to deny them.

John O'Brien swears that he is acquainted with Franklin Edson, the mayor of the city of New York; that he was one of the bidders upon the work recently let by the aqueduct commissioners in this city for the building of a new aqueduct; that after he had put in his bid for the said work, and after the several bids had been opened and the lowest bidder ascertained, Mr. Edson, who is and was one of the aqueduct commissioners, sent a messenger requesting him to come to

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his (the mayor's) office; that he went there and saw him; that he said that he (the mayor) had sent out two or three messengers to find him and he was very anxious to see him; that they went into the mayor's private office, and that the mayor then said to the affiant: "Why cannot you arrange with Brown, Howard & Co. for each to take half the work?" That Mr. O'Brien said: "No, I am entitled to the whole of the work, and ought to have it," and that Mr. Edson then said if he would get him (Edson) two aldermen to confirm his nomination of commissioner of public works—Fitz-John Porter—he (Edson) would, as a member of the aqueduct commission, vote to give him the whole of the work. This affidavit shows that the mayor was endeavoring by corrupt means to secure aldermen to vote for the confirmation of Fitz-John Porter; it does not show that the mayor has attempted to secure the confirmation of any other person. The facts stated in this affidavit do not warrant the court in restraining the mayor from making any nomination. They only warrant an injunction restraining the nomination (and perhaps confirmation) of one particular individual.

It therefore becomes necessary to examine the other affidavits. They appear on the first reading to state facts, but a careful examination shows that they state conclusions and not facts. The affidavits of James A. Lyons and Patrick Handibode relate only to the confirmation of Fitz-John Porter, and in that respect are to be classed with Mr. O'Brien's affidavit. But they prove nothing, they are hearsay and are not admissible in evidence against any of the defendants. The affidavit of James H. Londergan was for the same reason stricken out on the argument, and the only other affidavit that purports to state any facts is that of Mr. Johnson. He swears, among other things, that he is "informed and believes that it is the purpose of certain persons by connivance and corrupt combination, unlawfully and corruptly to secure the appointment to important offices in this city of certain persons by means of bribes and gross corruption." The officers referred

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to are the counsel to the corporation and the commissioner of public works.

He further alleges on information and belief, and charges "that there has been formed and is about to be carried out a corrupt bargain and conspiracy by which it is and will be attempted to secure the appointment of persons to said offices on condition that when appointed such heads of departments will appoint certain other persons to certain other subordinate office or positions," and that certain aldermen "have corruptly agreed to vote in favor of the confirmation of certain persons to be appointed by the mayor to said offices on condition that either they or certain of their friends be appointed to fill the said subordinate office."

These allegations are too indefinite and uncertain to sustain an injunction. The affiant does not give the source of his information or the grounds of his belief. He does not state who the persons are that are to be corruptly appointed and confirmed, but refers to them by the vague appellation of "certain persons." The mere allegation that there is a corrupt bargain and conspiracy, unless sustained by other facts, amounts to nothing and is only a conclusion (*Rosenberg agt. Block*, 49 *Supr. Ct. R.*, 488; *Putnam agt. Hubbell*, 42 *N. Y.*, 107). "Mere information and belief, without any reasons for it, is not proof or evidence in any legal sense" (*Roderigas agt. East River Savings Institution*, 76 *N. Y.*, 323). In this case the court of appeals held that a petition that alleged the death of a person upon the best of the knowledge, information and belief of the petitioner, was not due proof of the death, such as would give the surrogate jurisdiction to issue letters of administration (76 *N. Y.*, 316). And it has been held that an affidavit stating upon information and belief that a bank is insolvent, is not sufficient evidence to authorize the granting of an injunction, although the bank had suspended specie payments (*Livingston agt. Bank of New York*, 26 *Barb.*, 304, 307). And where facts are stated on information and belief, the sources of information and grounds of belief should

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be given (*People agt. Mayor, &c.*, 9 Abb., 253). The rule is well stated in *High on Injunctions* (secs. 28 and 35), as follows: "When fraud is relied upon as the foundation for an injunction, the allegations of the bill must be of specific and definite acts of fraud, and not mere general averments; and in the absence of such specific allegations a court of equity will not interfere, although irreparable injury is alleged." * * * "An injunction being a harsh remedy, will not be granted in the first instance, except upon a clear *prima facie* case and upon positive averments of the equities on which the application for the relief is based. Nor will merely argumentative allegations or inferences from the facts stated suffice to meet the requirements of this rule." It is also to be borne in mind that the allegations of fraud and conspiracy in the moving papers are denied by seven of the aldermen. For the reasons above stated the injunction is vacated, with costs.

The questions involved on this motion are novel and of the greatest importance. I have examined carefully the reports of this state, of the other states, and of Great Britain, and the text books on corporation, injunctions and equity, and I have not been able to find a case like this. I have found cases in which courts of equity have restrained municipal corporations from corruptly granting a franchise. Of this nature are the cases of *Davis agt. The Mayor, &c.* (1 Duer); *Christopher agt. The Mayor* (13 Barb., 667); *Milhau agt. Sharp* (15 id., 193). I have found cases in which other corporations have been restrained from illegal action where such action would be to the detriment of their stockholders, and in the *Excise cases* (1 *Lancaster Law Review*), the corrupt action of a board of excise in granting a license to sell liquors through bribery, was set aside. I cannot see why the court cannot restrain the doing of an illegal act if they have the power to set aside that act when done. To hold otherwise would be to allow a person who has secured his appointment to an office to hold the office until his appointment was set aside. It seems to me that I have not extended the doctrine of such cases as *Dav*

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agt. *The Mayor* ; *People* agt. *Sturtevant* ; *People* agt. *Dwyer* ; *People* agt. *Canal Board*, in holding that a court of equity can restrain public bodies and public officers from making a corrupt appointment to an office to the prejudice of the public. So to do is not controlling the discretion of a legislative body.

SUPREME COURT.

JAMES POTTS agt. ALEXANDER V. DAVIDSON, as sheriff, &c.

Code of Civil Procedure, section 170 — When stay provided for by this section will not be granted.

The stay under section 170 of the new Code, which stays proceedings against the sheriff until he can collect from the bondsman of an escaped judgment debtor, is discretionary and the court will not grant it where the sheriff has not proceeded with diligence.

Special Term, December, 1884.

DEFENDANT moved to stay the plaintiff on his judgment for an escape until defendant could collect from the sureties on the undertaking given by one John Flanagan, an escaped prisoner. Plaintiff claimed that defendant had not proceeded with due diligence.

W. G. Peckham, for plaintiff.

E. J. Cramer & W. Burke Cockran, for defendant.

BARRETT, J.—The sheriff should have moved for a summary judgment against the sureties immediately upon the entry of judgment against himself. Had he done so this motion would probably have been unnecessary, as the amount sued for could have been collected in a short time. Certainly the motion for summary judgment should have been made *pari passu* with this motion. In its absence there is no evidence of diligence or good faith. The intention of section

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170 of the Code was to protect the sheriff while he is doing everything which the law permits promptly and diligently to collect from the sureties. For aught that appears the sheriff has not sued the sureties yet. Under the circumstances he is not entitled to the favor which might otherwise have been accorded to him under section 170. The motion must be denied, with costs, and the stay vacated.

SUPREME COURT.

JAMES POTTS, judgment plaintiff, agt. ALEXANDER V. DAVIDSON, as sheriff, &c., judgment defendant.

Practice — Supplementary proceedings against the sheriff when he is a judgment debtor — Third party order, what should contain — Code of Civil Procedure, section 2441.

A third party order, before the return of execution need not contain the matters requisite to an affidavit and order to examine the judgment debtor himself before the return of an execution. It seems that supplementary proceedings can be maintained against the sheriff when he is a judgment debtor.*

Special Term, January, 1885.

JUDGMENT plaintiff took out a third party order to examine the Bowery National Bank, claiming simply that said bank was indebted to the judgment defendant, who was sheriff of New York county, in a sum exceeding ten dollars. The execution was in the coroner's hands and had not been returned. Counsel for defendant moved to set aside the order on the ground that the demand and other requirements on an order to examine the judgment debtor in aid of execu-

* In a previous order to examine the sheriff himself in aid of execution LAWRENCE, J., held the order to examine the sheriff defective, for not stating the points required in *Sackett agt. Newton*, viz., demand, nature of property, &c. It seemed to be agreed in both proceedings that supplementary proceedings could be maintained against the sheriff or against the debtor of the sheriff, a third party.

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tion as held in *Sackett agt. Newton*, are also indispensable in a third party order which is taken out before the return of execution. The judgment creditor maintained that his affidavit and order were sufficient although they did not contain an allegation of demand or a description of the indebtedness, citing *Davis agt. Herrig* (65 *How. Pr.*, 290); *Miller agt. Adams* (52 *N. Y.*, 410); *Foster agt. Prince* (18 *How. Pr.*, 258), and forms and affidavits in *Seeley agt. Garrison* (10 *Abb.*, 462, 2 *Till. & S.'s Pr.*, 865).

E. J. Cramer, for bank.

W. G. Peckham, for judgment plaintiff.

ANDREWS, J., overruled the objections.

SUPREME COURT.

RICHARD MARSHALL, administrator, respondent, agt. CHARLES E. BRESLER, appellant.

Code of Civil Procedure, sections 488, 721—Foreign administrators—Accounting by—Clerical errors in copies—Demurrer—Legal capacity to sue—Cause of action.

An administrator appointed in a foreign country upon coming into this state with assets may be required to account in his character of trustee, to one entitled to a distributive share, without taking out letters here. The plaintiff as administrator of a next of kin sued defendant for an accounting of an estate he was administrator of in Germany, the assets of which it was alleged he had brought into this state and converted to his own use, held on demurrer that the plaintiff possessed a good cause of action.

By a clerical error the date of plaintiffs appointment as administrator was written in the copy of the complaint served on the defendant 1873 (which was before the intestate's death) instead of 1883 as it appeared in the original; and the plaintiff in the caption styled himself "administrator" in place of "as administrator," and omitted in the body of

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his complaint to state expressly that he sued in his representative capacity :

Held, that a demurrer to his legal capacity to sue was not tenable.

Second Department, General Term, February, 1885.

Before BARNARD, C. J., DYKMAN and PRATT, JJ. :

THE plaintiff's complaint stated that about March 5, 1873 one Amelia Schultz, unmarried, died intestate at Apolda, Saxon Weimar, Germany, possessed of real and personal estate amounting to upwards of \$56,566, leaving as her sole heirs and next of kin her sister Louisa Marshall the plaintiff intestate, and the decendants of Willimena Hehner a deceased sister, who were made defendants, as their consent could not be obtained to be joined as plaintiffs. It further averred that about March 10, 1873 the defendant Charles E. Bresler obtained from said Louisa Marshall a power of attorney authorizing him to act for her in the settlement of said estate, to collect her share and to perform in her name all acts necessary to accomplish said objects in pursuance of which said Bresler was appointed at Apolda, Saxon Weimar, Germany, about May 15, 1873, sole administrator of said estate, qualified and entered upon the duties of the office, took possession of said estate as said administrator, sold the real property and became possessed in all of about \$56,566 in personalty; that after the payment of all just debts there remained a balance of many thousands of dollars, though said Bresler attempted to maintain it was only \$9,500; plaintiff believes it much greater; one-half of said balance by the laws of said domicile of said Amelia Schultz and of this state, belonged to said Louisa Marshall. That said Bresler brought said balance into this state, and has it here now within the jurisdiction of this court, having purchased property with it and converted it to his own use. That said Bresler never rendered an account of his proceedings as said attorney or as said administrator or paid the distributive share of said Louisa Marshall, though frequently requested so to do, after the

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expiration of eighteen months from his appointment as such administrator. That said Louisa Marshall died intestate and on February 9, 1883, letters of administration on her estate were duly issued to the plaintiff by the surrogate of New York county, whereby he was appointed administrator and thereupon having qualified, he entered upon the duties of the office. Judgment was demanded that said Bresler render an account of his proceedings as such attorney and administrator, showing the amount of said Amelia Schultz's personal estate which came into his hands or into the hands of any person or persons by his order or for his use; also showing the said intestate's just debts, and that the residue over such debts be ascertained, and that defendant Bresler pay to the plaintiff one-half thereof with interest from June 1, 1874, besides the costs.

By a clerical error in transcribing, the date of plaintiff's letters of administration was written February 9, 1873, in the copy of the complaint served on the defendant Bresler, instead of February 9, 1883, as it was in the original. The defendant Bresler demurred to the complaint, that it did not state facts sufficient to constitute a cause of action; and that the plaintiff had not legal capacity to sue on the ground that a cause of action accruing in the lifetime of the intestate must be brought by the administrator.

CULLEN, J., overruled the demurrer and gave judgment for the plaintiff thereon, with costs, with leave to the defendant to put in an answer within twenty days on payment of costs. The defendant appealed.

William N. Cohen and *Lauterbach & Spingarn*, for appellant contended that the cause of action having accrued in Louisa Marshall's lifetime could be brought only by her administrator (*Ketchum* agt. *Ketchum*, 4 *Cowen*, 87; *Patterson* agt. *Patterson*, 59 *N. Y.*, 576, 582; *Sheldon* agt. *Hoy*, 11 *How. Pr.*, 11; *Slocum* agt. *Barry*, 34 *How. Pr.*, 320; *affirmed*, 38 *N. Y.*, 46). The action is brought by Richard Marshall,

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the individual, for the title omits the word "as" before administrator (*Bannon agt. McGrove*, 45 *N. Y. Supr.*, 517; *Sheldon agt. Hoy*, 11 *How. Pr.*, 11; *Stilwell agt. Carpenter*, 62 *N. Y.*, 639; *Merritt agt. Seaman*, 6 *N. Y.*, 163; *Gould agt. Glass*, 19 *Barb.*, 197). Where the title is thus defective it must appear in the body of the complaint that plaintiff sues in that capacity (*Fowler agt. Westervelt*, 17 *Abb. Pr.*, 63; *Gould agt. Glass*, *supra*; *Shuler agt. Meyers*, 5 *Lans.*, 170). There is no intimation of any representative capacity in the complaint (*Bannon agt. McGrove*, *supra*; *Carpenter agt. Stilwell*, *supra*). It appears by the complaint that Louisa Marshall was living on May 10, 1873, while, according to the copy of it served on the defendant, letters of administration on her estate were issued to the plaintiff on February 9, 1873. Admitting that this is an error of the copyist in transcribing, yet the party serving it is bound by it (*Fiske agt. Noble*, *Daily Reg.*, May 31, 1883; *see Bank agt. Van Rensselaer*, 6 *Hill*, 240). The allegation is fatally defective in not averring that the plaintiff is administrator at the time of bringing the suit (*See Forrest agt. Mayor*, 13 *Abb.*, 350; *Gould agt. Glass*, *supra*; *Shuler agt. Meyers*, *supra*; *Austin agt. Munro*, 47 *N. Y.*, 363). This defect distinguishes the present case from those holding that the representative capacity need not appear in the title (*Fowler agt. Westervelt*, *supra*; *Beers agt. Shannon*, 12 *Hun*, 161).

Henderson Benedict, for respondent claimed that the cause of action was sufficient, as the defendant being found here with assets could be required to account as a trustee. He is not sued as administrator. Payment cannot be enforced in Germany, because both the defendant and the property are here, and if it could not be accomplished here a failure of justice would be the result. The principle was adopted as long ago as A. D. 1600 in *Dowdale's case* (6 *Co. R.*), through lord COKE, who said: "If the executor have goods in any part of the world, he should be charged in respect of them."

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It is the unquestioned law of this state (*McNamara* agt. *Dwyer*, 7 *Paige*, 239; *Montalvar* agt. *Claver*, 32 *Barb.*, 190; *Gulick* agt. *Gulick*, 33 *Barb.*, 92; *Campbell* agt. *Toucey*, 7 *Cowen*, 64; *Brown* agt. *Brown*, 1 *Barb. Ch.*, 190; *Sloter* agt. *Carroll*, 2 *Sanf. Ch.*, 573; *Field* agt. *Gibson*, 20 *How.*, 277, *per* DAVIS, *P. J.*; *Matter of Webb*, 11 *Hun*, 125; *see* 5 *Redf.*, p. 364). The same rule prevails outside of New York (*Anderson* agt. *Counter*, 2 *Myl. & Keene*, 763; *Tunstall* agt. *Pollard*, 11 *Leigh [Va.]*, 1; *Monion* agt. *Tilsworth*, 18 *B. Monroe [Ky.]*, 597; *Johnson* agt. *Jackson*, 56 *Ga.*, 326; *Bryan* agt. *McGee*, 2 *Wash. C. C. R.*, 337; *Pugh* agt. *Jones*, 6 *Leigh [Va.]*, 310; *Swearinger* agt. *Pendleton*, 4 *S. & R. [Penn.]*, 389; *Evans* agt. *Tatum*, 9 *id.*, 252; *Willing* agt. *Perot*, 5 *Raule [Penn.]*, 264). Our complaint contains all the averments of those in the foregoing cases, besides many additional ones. Defendant is asked to account as both attorney and administrator. There can be no question of our right to obtain an accounting of him as attorney wherever found (*Marvin* agt. *Brooks*, 94 *N. Y.*, 71; *Foley v. Hill*, 2 *H. of L. Cases*, 28). It is only necessary to show a trust or a fiduciary relation to obtain an accounting in equity, and charging conversion of the assets did not change the action from an accounting (*Segelken* agt. *Meyer*, 94 *N. Y.*, 473; *Marvin* agt. *Brooks*, *supra*). There is no improper joinder of causes of action for only one is stated, though defendant is asked to account as both attorney and administrator (5 *Daly*, 353; 18 *Hun*, 306; 10 *Abb.*, 445). The demurrer to plaintiff's legal capacity to sue is frivolous. His appointment as administrator is alleged, but it was unnecessary, for the description in the caption was alone sufficient. The Code (*sec.* 488) says, that to be demurrable "it must appear on the face of the complaint" that plaintiff "has not legal capacity to sue." If there be a mere failure to present the facts conferring capacity the objection must be taken by answer. To make the demurrer good it would have to "appear on the face of the complaint" that the plaintiff was not administrator. An

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omission to aver his appointment would not be enough, for then it could only be raised by answer alleging his non-appointment (*Code*, sec. 488; *Phenix Bank* agt. *Donnell*, 40 *N. Y.*, 410; *Barday* agt. *Quicksilver M. Co.*, 6 *Lans.*, 25; *Bank* agt. *Corbert*, 10 *Abb. N. C.*, 85). The omission of the word "as" before administrator in the title does not affect plaintiff's legal capacity to sue or prevent him from claiming as administrator (*Beers* agt. *Shannon*, 73 *N. Y.*, 292; *Stilwell* agt. *Carpenter*, 62 *N. Y.*, 639). In determining whether the plaintiff sues as administrator the whole pleading must be considered (*Stilwell* agt. *Carpenter*, *supra*). As the clerical error, which gives the date of plaintiff's letters of administration 1873 instead of 1883, only exists in the copy and not in original complaint, it must be disregarded and cannot disturb this judgment (*Chatham Nat. Bank* agt. *Merchants' Nat. Bank*, 1 *Hun.*, 702; *Code*, sec. 721, sub. 9). The error could not mislead the defendant (*Union Furnace Co.* agt. *Shepherd*, 2 *Hill*, 413; *Russell* agt. *St. Nicholas Ins. Co.*, 41 *Supr. Ct. [J. & S.]*, 279; *Parkhurst* agt. *Wolf*, 47 *id.*, 320). Even if calculated to mislead it is not a ground of demurrer and could only be taken advantage of by moving to set aside the service (*Nones* agt. *The Hope M. L. Ins. Co.*, 8 *Barb.*, 541; *Union Furnace Co.* agt. *Shepherd*, *supra*). Even with the letters dated 1873 no absence of capacity to sue was shown, for their issuing established his capacity and they were *prima facie* evidence of the surrogate's jurisdiction, and they could not be questioned in this collateral proceeding (*Bolden* agt. *Meeker*, 47 *N. Y.*, 307; *Rodergas* agt. *East River S. B.*, 63 *N. Y.*, 460).

✓ DYKMAN, J.—This is an action by an administrator to compel the defendant to account for money received by him for the plaintiff's intestate. The defendant has demurred to the complaint, and has assigned for his objections that it does not state facts sufficient to constitute a cause of action, and that the plaintiff has no legal capacity to sue for the reason that

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a cause of action accruing in the lifetime of the intestate must be brought by the administrator. Neither of these grounds of demurrer are tenable. The cause of action set out in the complaint is full and perfect against the defendant, it is this: Amelia Schultz, an unmarried lady, died in Germany intestate, leaving a large amount of property, and leaving Louisa Marshall among others her sole heirs and next of kin. Louisa Marshall then resided in the state of New York, and she executed a power of attorney to the defendant authorizing and empowering him to collect her portion of the estate for her.

Under and in pursuance of this power of attorney the defendant was appointed sole administrator of the estate of Amelia Schultz, in Germany, and received all her estate and property amounting to about \$56,566. After the payment of all the debts there remains a balance of many thousand dollars which the defendant has brought into this state and converted to his own use in the purchase of property. One-half of this belonged to the plaintiff's intestate Louisa Marshall, the client and principal of the defendant in the mentioned power of attorney.

The action is, therefore, against the defendant not as administrator founded on a liability of his intestate, but as an individual predicated on his wrongful use and misappropriation of trust funds. If this plaintiff cannot maintain an action against the defendant for the distributive share of his intestate, in the estate which came to the defendant and has been converted by him to his own use, then he will retain the same by virtue of his misappropriation. Plainly there is no such law and the complaint is sufficient (*McNamara agt. Dwyer*, 7 Paige, 239; *Montalver agt. Clover*, 32 Barb., 190; *Gulick agt. Gulick*, 33 Barb., 92). Neither is the second ground of demurrer well assigned, for the reason that the action is brought by the administrator. The complaint states that Louisa Marshall died intestate; that letters of administration on her estate were duly issued to the plaintiff by the surrogate of New York

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county, whereby he was appointed administrator, and thereupon having qualified he entered upon the duties of his office.

The action is brought by Richard Marshall administrator, &c., of Louisa Marshall, deceased, the judgment will be entered under the same title, and when the plaintiff collects the money which the defendant by this demurrer admits is in his hands, he will hold the same in his representative capacity as administrator of the estate of Louisa Marshall.

The order and judgment appealed from should be affirmed, with costs.

BARNARD, C. J., and PRATT, J., concur.

Judgment and order affirmed, with costs.

SUPREME COURT.

THE PEOPLE OF THE STATE OF NEW YORK *ex rel.* JOSEPH MILLSPAUGH agt. THE BOARD OF TOWN AUDITORS OF THE TOWN OF SHAWANGUNK.

Constable — Mandamus — When will issue to board of town auditors requiring them to audit constables' bill — When and how number of constables for a town to be fixed — When justices of the peace may appoint.

When a clear legal duty devolves upon an officer or upon a board of officers, which he or it refuses to discharge, a *mandamus* will lie to compel the performance of that which the law requires to be done.

Although the rule of law is that generally the courts will not interfere by *mandamus*, when a party has an adequate remedy by action, it does not apply to a case in which when an officer refuses to discharge his duty by an appeal to some other officer the desired relief may be obtained, but to one in which a court is asked to interfere by *mandamus* when the party has a complete remedy by action.

The relator presented to the board of town auditors a bill for services as one of the constables of such town, which such board refused to consider or to allow in whole or in part. The bill was made out in detail and verified substantially as prescribed in section 70 of 1 Revised Statutes (8th ed.), page 845. It is objected that the bill was not properly

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verified because the verification did not conform to section 2 of chapter 820 of Laws of 1869 :

Held, first. That the section referred to only applies to a bill in which the officer claims "the increase or additional travel fees provided for in this act," that is to say, those which said act allows. If the section referred to was in force it would justify the board in rejecting any charge for "additional travel fees," but it would not justify the refusal to consider the bill and to audit so much of it as was proper to be audited.

Second. That section is no longer in force, and as the relators did not apply for any allowance or audit under the act of 1869, the provision in such act relating to proof of services claimed under it is not now applicable.

Where, at the annual town meeting of 1849, the electors of the town determined that four constables should be elected that year, and in 1850 it was again "*Resolved.* That there shall be four constables elected." No resolution having been since passed on the subject :

Held, that the resolution could only be operative for one year ; and as by 1 Revised Statutes (6th ed.), 823, section 8, the general number of constables of a town is five, and at the town meeting held in 1884 the electors having chosen only four constables, the three justices of the peace properly appointed the relator and he became a legal officer of the town.

Ulster Special Term, November, 1884.

APPLICATION for a *mandamus*.

A. H. Van Buren, for relator.

A. B. Parker, for respondents.

WESTBROOK, J.—The relator presented to the board of town auditors of the town of Shawangunk a bill for services as one of the constables of that town, which such board refused to consider or to allow in whole or in part. The bill was made out in detail and verified substantially as prescribed in section 70 of 1 Revised Statutes (6th ed.), page 845. The relator asks that a writ of peremptory *mandamus* may issue to such board requiring it to consider and audit the bill. To the granting of the writ several preliminary objections are made, which will be separately stated and considered :

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First. It is said that a writ of *mandamus* will not lie, when a party has another remedy, and that as by chapter 832 of the Laws of 1866 the relator has an appeal to the board of supervisors the writ should not issue. It is perfectly well settled than when a clear legal duty devolves upon an officer or upon a board of officers, which he or it refuses to discharge, that a *mandamus* will lie to compel the performance of that which the law requires to be done. No other legal remedy exists to the relator in this case. It is no excuse for the respondents that the board of supervisors can do what they have refused to do. Their duty is still undischarged, and its discharge may be compelled. The rule of law which the respondents invoke has no application. That rule is, that generally the courts will not interfere by *mandamus* when a party has an adequate remedy by action. It does not apply to a case in which when an officer refuses to discharge his duty by an appeal to some other officer the desired relief may be obtained, but to one in which a court is asked to interfere by *mandamus* when the party has a complete remedy by action.

Second. It is urged that the bill of the relator was not properly verified because the verification did not conform to section 2 of chapter 820 of Laws of 1869. To this objection there are two answers: 1st. The section referred to only applies to a bill in which the officer claims "the increase or additional travel fees provided for in this act," that is to say, those which said act allows. If the section of the act of 1869, just referred to, was in force it would justify the board in rejecting any charge for "additional travel fees," but it did not justify the refusal to consider the bill, and to audit so much of it as was proper to be audited. 2d. But that section is no longer in force. It only applied to the additional fees, which *that* act gave. That act amended section 8 of the act of 1866 prescribing the fees of constables in criminal cases, and of course the provision as to proof of the services claimed under such act of 1869 existed only so long as the rate of compensation thereby given was in life. Chapter 324 of the Laws

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of 1875, and chapter 89 of the Laws of 1877 (the two are substantially alike), by declaring how section 8 of chapter 692 of Laws of 1866 should *thereafter* read repealed the act of 1869 so far as that act sought to change the same (the eighth) section in the act of 1866 aforesaid. As the relator did not apply for any allowance or audit under the act of 1869, it follows that the provision in such act relating to proof of services claimed under it is not now applicable (*See vol. 3 of R. S. [7th ed.], p. 2585, and the note at bottom of page.*)

Third. The affidavit of the relator, it is claimed, should not be entitled. The objection would have been good if it had been entitled in this proceeding, but it was not, and the title was such as to indicate the purpose for which it was to be used, to which there can be no objection. The preliminary objections must, therefore, be overruled, and the one set up in the opposing affidavit remains to be considered, which is this: At the annual town meeting of 1849 the electors of the town of Shawangunk determined that four constables should be elected that year, and in 1850 it was again "*Resolved, That there shall be four constables elected;*" and as no resolution has been passed on the subject since, the respondents contend that the appointment of the relator was illegal, and as he was no constable *de jure* he cannot receive fees for services rendered to the town.

It is exceedingly doubtful whether or not the payment of the relator's bill could be resisted upon any such ground. He received from the officers who formed a majority of the board of audit an appointment to the office of constable, which on its face seems to be valid and lawful. His right to act as such an officer has never been questioned. He has performed services for the town under the direction of the very officers who have rejected his bill, which were accepted and were valid services; and now when the town has received value for that which it is asked to pay, it refuses payment upon the sole ground that he was not a *de jure* constable of the town. The answer is a hard one and is believed to be unsound. Without,

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however, determining that question the objection is overruled on the ground that the relator was a *de jure* constable. The general number of constables of a town is five (1 *R. S.* [6th ed.], 823, sec. 8). The electors have power at an annual town meeting "to determine what number of constables * * * shall be chosen in such town for the then ensuing year." When, therefore, the electors of Shawangunk passed the resolution it could be operative only for that year, and that was all it professed to be. At the town meeting, held in 1884, the electors having chosen only four constables the three justices of the peace properly appointed the relator (1 *R. S.* [6th ed.], 835, sec. 57) and he became a legal officer of the town.

All the objections made to the relief asked must be overruled, and it remains only to consider the form of the order. If the respondents had made any objection to the bill of the relator, other than those stated, the bill would have been referred to them to be considered. As, however, neither by affidavit or argument has the performance or value of the services and charges in the bill been questioned, and as such value is fixed by statute to which the charges conform, the writ as asked for should be granted.

As a rule costs should not be given in a proceeding of this character. This case, however, presents exceptional features. The justices who gave to the relator his appointment as constable formed a majority of the board of audit, the services for which the bill contains charges, were mostly performed in executing the process of those same officers, for which doubtless they themselves have charged, and which by audit they probably have directed to be paid; and as the services rendered by the relator would have been rendered, if he had not acted, by some other officer of the town and been paid for, the rejection of the bill seems to have been a desire to secure services without compensation. Under such circumstances the relator should be indemnified in seeking redress, and an allowance to him of twenty-five dollars as and for the costs of this proceeding is hereby made.

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SUPREME COURT.

JEDEDIAH K. HAYWARD agt. JANE McDONALD *et al.**Improper joinder of causes of action — Code of Civil Procedure, sections 1843, 1846, 1852, 1854.*

A bill against the personal representatives of a deceased person to impress a lien upon the decedent's real estate cannot be joined with an action under the statute against his heirs and their grantees.

Special Term, February, 1885.

DEMURRER to plaintiff's complaint.

The grounds of the demurrer are, in substance, that several causes of action have been improperly united, and that the complaint does not state facts sufficient to constitute any cause of action.

Christopher Fine, for demurrer.*The Plaintiff*, in person, opposed.

BARRETT, J.—The plaintiff concedes that he has joined a bill against the personal representatives of McCunn to impress a lien upon the decedent's real estate, with an action under the statute against his heir and their grantees. These causes of action cannot be united. They proceed upon entirely different principles, and their joinder would be (as was said in *Green agt. Martine*, 27 Hun, 247, where a similar principle was discussed) "anomalous and incongruous." The action against the heirs is founded upon contracts made by the testator in his lifetime—that against the executors upon contracts made after his death. The former contracts bind the estate, and the judgment thereon against the executors runs *de bonis testatoris*. The latter contracts bind the executor personally, not the estate, and the judgment thereon is *de bonis propriis*. So far then as this complaint seeks to charge the real estate with contracts made by the executors,

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it proceeds, as palpably it must, upon some special equities entirely foreign to the case against the heirs under the statute. These equities, as we have gleaned with some difficulty from the perusal of this exceedingly loose and confusing complaint, are the insolvency of the executors and the fact that the services rendered under the contracts tended to the conservation and protection of the estate. It is apparent that this is a distinct action from an action under the statute against the heirs upon contracts made by the testator in his lifetime; distinct in its scope and object, and requiring different parties, allegations and proofs as to the parties. It has been repeatedly held that in an action by a creditor to charge the heir in respect to lands descended, the personal representatives cannot be joined (*Mersereau agt. Ryerse*, 3 *Const.*, 262, citing *Butts agt. Genung*, 5 *Paige*, 259, and *Schermmerhorn agt. Borhydt*, 9 *id.*, 45). The heirs must all be sued jointly (*Code*, sec. 1846), and they are respectively liable, to the extent of the estate which descended to them, for debts of the deceased growing out of his contracts (*Sec.* 1843). A method is provided of enforcing this liability either by charging the estate, if it has not been aliened (*Sec.* 1852), or, if it has and the creditor so elects, by charging the heir personally (*Sec.* 1854). Under no circumstances, however, are the heirs personally liable for debts incurred by the executors. If, then, these debts, which the law treats as personal obligations of the executors, are to be impressed upon the decedent's real estate at all, it can only be, as already suggested, by the application of equitable principles entirely foreign to the statutes regulating "actions relating to decedents's estates." That some such action might be maintained "in case of the fraud or insolvency of the executor" was hinted at in *Ferrin agt. Myrick* (41 *N. Y.*, 325), but it was "an equitable cause of action," which as the court intimated "would probably be created against the estate." In this same case Mr. justice HUNT, after reviewing the authorities, held the principle to be settled, the causes of action against executors as such — that is, upon co

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tracts made with the testator in his lifetime — cannot be united with causes of action against the executors upon contracts made after his death. *A fortiori*, it would seem to follow that a special statutory action to charge the heirs and their grantees with the decedent's obligations should not be united with a special equitable action to have the executor's obligations decreed to be a lien upon the estate.

There are other seemingly fatal objections to this complaint, *e. g.*, the assumption that the heirs and their grantees are bound by the judgments recovered against the executors and the consequent failure to state any cause of action against the decedent. As we understand it, a judgment against executors is only *prima facie* evidence in the surrogate's court, and when there was a trial upon the merits. It is also questionable whether any cause of action is stated against Mr. Fine. But upon these and other points it is not necessary at present to express a definite opinion, as the demurrer, for the reasons already assigned, must be sustained, and the plaintiff in severing his actions, and otherwise amending, may, by appropriate averments and greater care, avoid some of these questions.

There must be judgment for the defendants upon their demurrer, with costs, but with leave to the plaintiff to amend his complaint within twenty days upon payment of such costs.

N. Y. SUPERIOR COURT.

THEODORE ROOSEVELT and others, plaintiffs, agt. FRANKLIN EDSON, impleaded with others, defendant.

Injunction — Contempt — When and under what circumstances municipal officers may be restrained from making appointments to office — When guilty of contempt for disobeying injunction — Code of Civil Procedure, sections 603, 604, 399, 607, 605, 2284, 9, 8, 10, 2269, 606, 722, 277, 1809 to 1813.

Upon a motion to punish the defendant, the mayor of the city of New York, for contempt in disobeying an order of injunction restraining

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him from appointing to, or nominating for, the office of commissioner of public works, or the office of counsel to the corporation, any person until the further order of this court. After adopting the conclusions reached by judge TRUAX on the dissolution of this injunction (*see, ante*, 205):

Held, first, that the decision of judge TRUAX is no bar to the present application. During the existence of the injunction the defendant was bound to obey it, unless it was not merely voidable but absolutely void, for the reason that it was made without any jurisdiction whatever.

Second. A party will be in contempt for breach of an injunction, if the officer allowing it had jurisdiction, notwithstanding that it was erroneously granted, and for an insufficient cause.

Third. A judge of the court of common pleas is a county judge within the meaning of section 606 of the Code of Civil Procedure, and under section 772 an order may be granted by a judge of the court out of court; it may be made by any justice of the supreme court, or by any judge of the superior court in the county wherein his court is located, or by the county judge of the county where the action is triable, or in which the attorney for the applicant resides.

Fourth. Section 1809 of the Code of Civil Procedure does not apply to the corporation of the city of New York, nor to any officer thereof.

Fifth. While in a case falling within section 608 of the Code of Civil Procedure, which applies to this case, the court or judge as a matter of orderly practice should insist upon the presentation of a formal complaint at the time of the application for an injunction, a failure to do so on granting the injunction, though it may constitute ground for a subsequent motion to vacate, is not a jurisdictional defect which renders the injunction *ipso facto* void.

Sixth. While the judge had the power to vacate the order of injunction for the reason that the proper practice had not been observed by the plaintiffs in the procurement of it, the judge was not without jurisdiction in granting it.

Seventh. In every aspect of this case the judge had sufficient jurisdiction to grant an order of injunction in it, and consequently the injunction he granted was valid in law as long as it remained in force and the defendant had no right to disobey it.

Eighth. The defendant failed to establish any excuse of which the law can take cognizance, and is guilty of a willful disobedience to the lawful mandate of this court in deliberately violating the order of injunction served upon him, and is guilty of a criminal contempt of this court.

Ninth. Because the defendant acted by advice of counsel is not a legal reason why he should not be punished, but is only an extenuating circumstance to be considered in meting out punishment.

Special Term, February, 1885.

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MOTION to punish the defendant for contempt in disobeying an order of injunction granted in this action.

Charles P. Miller, attorney and counsel, for plaintiffs.

Sewell, Pierce & Sheldon, attorneys, and *David Dudley Field* and *Robert Sewell*, of counsel, for defendant.

FREEDMAN, J. — This is an application on behalf of the plaintiffs that the defendant Franklin Edson be punished for a contempt of this court in willfully disobeying and violating an order of injunction heretofore granted in this action by the Hon. MILES BEACH, a judge of the court of common pleas for the city and county of New York, by which the said defendant, as mayor of the city of New York, was enjoined and restrained from appointing to, or nominating for, the office of commissioner of public works, or the office of counsel to the corporation, any person until the further order of this court.

A copy of the said order of injunction, together with a copy of the bond or undertaking given by the plaintiffs on its procurement, and a copy of the summons in the action, accompanied by copies of the affidavits on which the order was granted, having been duly served on the defendant on the 30th day of December, 1884, no question arises as to the jurisdiction of the court over the person of the defendant, provided there was jurisdiction in other respects. Since the service thus made the question whether the injunction should be continued during the pendency of the action was elaborately argued before the Hon. CHARLES H. TRUAX, at a special term of this court, and that learned judge decided that the motion for the continuance of the injunction should be denied and that the preliminary injunction should be dissolved (*Ante* 205).

This decision is no bar to the present application. During the existence of the injunction the defendant was bound to obey it, unless it was not merely voidable but absolutely void, for the reason that it was made without any jurisdiction whatever. Chancellor WALWORTH, in *The People* agt. *Sparlding*

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(2 *Paige*, 326), said: "While the injunction remained in force it was the duty of the vice-chancellor to punish every breach thereof; and in no case can a defendant be permitted to disobey an injunction regularly issued, whatever may be the final decision of the court upon the merits of the cause. If there is not sufficient equity upon the face of the bill to support the injunction the proper course for the defendant is to apply at once for a dissolution." A party, therefore, will be in contempt for breach of an injunction, if the officer allowing it had jurisdiction, notwithstanding that it was erroneously granted, and for an insufficient cause (*Sullivan* agt. *Judah*, 4 *Paige*, 444; *Davis* agt. *The Mayor, &c.*, 1 *Duer*, 451; *The People* agt. *Sturtevant*, 9 *N. Y.*, 263; *The Erie Railway Co.* agt. *Ramsey*, 45 *N. Y.*, 637; *The People* agt. *Dwyer*, 90 *N. Y.*, 402).

But although the decision referred to is no bar, the grounds upon which it was made are important elements to be considered. In making that decision judge TRUAX, in a carefully prepared opinion, reached, in substance, the following conclusions, viz.: 1. That in a proper action, brought by the proper party and upon sufficient facts properly presented, an injunction restraining the making of an illegal or corrupt appointment to a public office by the mayor of the city of New York may be issued. 2. That the facts presented by the affidavits in this case did not warrant an injunction restraining the mayor from making any appointment or nomination, but only an injunction restraining the appointment or nomination and the confirmation by the board of aldermen of a particular individual, viz., Fitz-John Porter; and 3. That because the papers upon which the injunction was granted were unaccompanied by a complaint, and because the action was one in which the right to injunctive relief must appear from the complaint, the preliminary injunction which restrained the appointment or nomination of any person should be vacated entirely.

The interests of an orderly administration of justice, as well

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as judicial custom and tradition, require that in the absence of proof of a clear mistake or oversight, or of new and additional facts calling for a change, I should, while sitting at special term, respect and follow these conclusions. A careful examination of the facts now made to appear, and due reflection upon the arguments of the learned counsel for the respective parties, have failed to present to my mind a sufficient reason for a departure from the usual course. I shall therefore, in the disposition to be made of the present application, adopt the conclusions reached by judge TRUAX as far as they go. But they do not determine the question whether the learned judge of the court of common pleas who granted the preliminary injunction had jurisdiction to grant that particular injunction.

Upon this point it is claimed, in the first place, that the injunction was null and void because the learned judge who granted it was not and is not a judge of this court, but of the court of common pleas, and because the only authority which prescribes by whom an order of injunction may be granted is contained in section 606 of the Code of Civil Procedure. Under that section an injunction order may be granted: (1) By the court in which the action is brought, (2) or by a judge thereof, (3) or by any county judge.

In the *Matter of Morgan, &c.* (56 N. Y., 629) and in *Lang agt. Brown* (6 Hun, 256) it was held that the judges of the court of common pleas are county judges for certain purposes, and in *Wood agt. Kelly* (2 Hilton, 334) it was pointed out that they possessed all the powers of county judges. The reasons which prevailed in these cases would require me to hold that a judge of the court of common pleas is a county judge within the meaning of section 606, if that section were, as claimed, the only authority which specifies the officers who may make such an order. But such is not the fact. The section itself commences with the words, "except where it is otherwise specially prescribed by law." Section 772 makes further and special provision to the effect that where an order

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in an action may be made by a judge of the court out of court, it may be made by any justice of the supreme court, or by any judge of a superior city court within the city wherein his court is located, or by the county judge of the county where the action is triable or in which the attorney for the applicant resides. This disposes of the claim, so far considered, for the concluding part of the section prescribing the manner in which an order thus made, in case it grants a provisional remedy, may be vacated or modified, clearly shows that the order referred to includes any order granting a provisional remedy, and a preliminary injunction is a provisional remedy. In addition to all this, it may yet be pointed out that section 277 provides that in an action or special proceeding brought in a superior city court, an order may be made without notice, or an order to stay proceedings may be made upon notice, by the county judge of the county where the court is situated, or of the county where the attorney for the applicant resides, in a case where a judge of the superior city court might make the same out of court and with like effect.

In the next place the defendant claims that the injunction was null and void under section 1809, which is as follows, viz: "An injunction order suspending the general and ordinary business of a corporation, or of a joint-stock association, consisting of seven or more persons, or suspending from office, or restraining from the performance of his duties, a trustee, director or other officer thereof, can be granted only by the court upon notice of the application therefor, to the proper officer of the corporation or association, or to the trustee, director or other officer enjoined. If such an injunction order is made otherwise than as prescribed in this section, it is void."

This section is contained in article 5 of title 2 of chapter 15 of the Code of Civil Procedure. Title 2 of this chapter is entitled "Actions relating to a corporation," and the different articles of this title are respectively entitled as follows, viz:

ARTICLE 1. Action by a corporation, and against a corporation, to recover damages or property.

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ARTICLE 2. Judicial supervision of a corporation, and of the officers and members thereof.

ARTICLE 3. Actions to procure the dissolution of a corporation, and actions to enforce the individual liability of the officers or members of a corporation, with or without a dissolution thereof.

ARTICLE 4. Action by the people to annul a corporation.

ARTICLE 5. Provisions applicable to two or more of the actions specified in this title.

Section 1804, which is the first section of article 5, provides that articles 2, 3 and 4 of title 2 do not apply to an incorporated library society; to a religious corporation; to a select school or academy incorporated by the Regents of the University, or by an act of the legislature, or to a municipal or other political corporation created by the constitution, or by or under the laws of the state.

From this it would seem as if sections 1804 to 1813, contained in article 5, were left so as to include a municipal corporation. But the provisions of article 5 are defined in the title of said article to be applicable only to two or more of the actions specified in title 2. Now, all the actions specified in that title (except those mentioned in sections 1778, 1779 and 1780, in article 1, which relate to actions against foreign corporations, and to an action against a domestic corporation, on a promissory note or other evidence of debt) are specified in articles 2, 3 and 4, and concerning these articles it is expressly enacted, as already stated, that they shall not apply to a municipal corporation. Sections 1805, 1806, 1807 and 1808 of article 5 refer expressly to actions brought as prescribed in articles 2, 3 and 4. Section 1810 provides for the appointment of receivers of corporations. Section 1812 contains express limitations on the application of section 1809, and both these sections are taken from chapter 151 of Laws of 1870, a reference to which shows that it was meant to refer to business corporations only. The limitation contained in section 1812 requires that the application of section

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1809 shall be confined to corporations, or joint-stock associations created by or under the laws of this state, and to the trustees, directors or other officers of such corporations. The corporation known by the title of "the mayor, aldermen and commonalty of the city of New York" was not in any sense created by or under the laws of the state of New York though it is now subject to such laws. It was created by and under crown charter still largely in force and effect.

It therefore clearly appears that section 1809 does not apply to the corporation of the city of New York, nor to any officer thereof. But even if it did it would only, as I am inclined to think, prohibit the granting, without previous notice, of an injunction which, when granted, would operate as a suspension of the general and ordinary business of the corporation, or as a total suspension from office of an officer thereof, or as a total restraint upon the general performance of the duties of such an officer.

The injunction in the case at bar was not of that character. It only restrained the exercise of a single power or duty out of many, and it left the general and ordinary business of the corporation, if a municipal corporation can be deemed to have a general and ordinary business within the true meaning of these words as used in section 1809, undisturbed, and the mayor unrestrained in the performance of his other multifarious powers and duties. In this connection it may be well to point out that chapter 531 of the Laws of 1881, which will be more fully considered hereafter, expressly authorizes the granting of an injunction against any officer of a municipal corporation to prevent any illegal official act.

In the third place the defendant claims that the injunction was null and void, for the reason that the facts presented by the affidavits did not warrant an injunction restraining the mayor from making any appointment or nomination, but at most only an injunction restraining the consummation of the appointment and the confirmation of such appointment by the board of aldermen of a particular individual, viz., general

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Fitz-John Porter. That the affidavits contained competent proof only to such a limited extent has been expressly decided by judge TRUAX. But from that it does not follow that the injunction, though too broad, was without jurisdiction.

The papers presented on the application for the injunction showed that the action was brought under chapter 531 of the Laws of 1881, entitled "An act for the protection of tax-payers." This statute provides that all officers, agents, commissioners and other persons acting for and on behalf of any county, town, village or municipal corporation in this state, and each and every one of them, may be prosecuted, and an action or actions may be maintained against them to prevent any illegal official act on the part of any such officers, agents, commissioners or other persons, or to prevent waste or injury to any property, funds or estate of such county, town, village or municipal corporation by any person whose assessment or by any number of persons jointly the sum of whose assessments shall amount to \$1,000, and who shall be liable to pay taxes on such assessment or assessments in the county, town, village or municipal corporation to prevent the waste or injury of whose property the action is brought, or who have been assessed or paid taxes therein upon an assessment or assessments of the above named amount within one year previous to the commencement of any such action or actions.

This statute took the place of chapter 435 of the Laws of 1880, which it repealed. The act of 1880 amended chapter 526 of the Laws of 1879, which amended chapter 161 of the Laws of 1872, which was the first of the so-called tax-payers' acts. The act last referred to conferred upon certain tax-payers therein described the right to prosecute all officers and agents acting for and on behalf of any county, town or municipal corporation in order to prevent waste or injury to any property, funds or estate of such county, town or municipal corporation. By the act of 1881 all officers and agents of villages were included and the right of action enlarged so as to enable the complaining tax-payers not only to prevent

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the waste or injury referred to, but also to restrain any illegal official act. Upon furnishing, as required by said act, a bond to the defendant in the action, to be approved by a judge, and a copy of which is to be served with the summons, the plaintiff or plaintiffs in such an action may have an injunction to accompany the summons.

In the case at bar a bond drawn in conformity with the requirements of the statute was submitted to judge BEACH with the summons in the action and certain affidavits. These affidavits, as already stated, contained sufficient competent proof to authorize an injunction restraining the consummation of the appointment, and the confirmation of such appointment by the board of aldermen, of general Fitz-John Porter as commissioner of public works. But that was not all. They also contained many allegations having the appearance of allegations of fact to the effect that, in furtherance of a corrupt bargain and combination, the nomination of general Fitz-John Porter to the board of alderman would be withdrawn by the mayor, and that thereupon, in furtherance of a corrupt bargain or understanding, the defendant, as mayor, would illegally make, and the board of aldermen illegally confirm, nominations for the office of commissioner of public works and the office of counsel to the corporation, and that under no circumstances honest nominations were to be made.

Upon the papers thus presented and their contents, judge BEACH was called upon to determine whether an injunction of some sort should issue, and if so to what extent, or whether the motion for an injunction should be denied altogether. If he had jurisdiction to make the determination, he had jurisdiction to act further in the premises.

Now, the act of 1881 expressly authorizes a county judge to make such a determination and to act upon it. If therefore judge BEACH possessed no other power than the powers of a county judge acting exclusively under and by virtue of the authority vested in him by the act of 1881, which is hardly the case, he had at least jurisdiction to that extent. The same

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reasons which required me to hold that he was and is a county judge within the meaning of that term as used in section 606 of the Code, call for the conclusion that he was and is a county judge within the meaning of that term as used in the statute of 1881.

The inevitable consequence is that, inasmuch as he had power to determine the application and to act further in the premises after having determined that the plaintiffs were entitled to injunctive relief of some sort, jurisdiction attached to the order as finally granted. The authorities upon this point are quite conclusive.

In *The People* agt. *Sturtevant* (9 N. Y., 263) it was held that on an appeal from a commitment for contempt in disobeying an injunction, the question of jurisdiction does not involve the inquiry whether the case made by the complaint entitled the plaintiffs to relief, but only whether the court had power to decide whether it entitled them to relief or not.

In *Hunt* agt. *Hunt* (72 N. Y., 217) it was held that jurisdiction over the subject-matter of an action does not depend upon the ultimate existence of a good cause of action in the plaintiff in the particular case. Jurisdiction is the power lawfully conferred to deal with the general subject involved in the action.

In *Lange* agt. *Benedict* (73 N. Y., 12), FOLGER, J., says: "What is meant by jurisdiction of the subject-matter we have had occasion to consider lately in *Hunt* agt. *Hunt* (72 N. Y., 217). It is not confined within the particular facts, which must be shown before a court or a judge, to make out a specific and immediate cause of action; it is as extensive as the general or abstract question which falls within the power of the tribunal or officer to act concerning. * * * It is the general abstract thing which is the subject matter. The power to inquire and adjudge whether the facts of each particular case make that case a part or an instance of that general thing, that power is jurisdiction of the subject-matter."

In the *Mayor, &c., of New York* agt. *New York and*

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Staten Island Ferry Company (64 N. Y., 622) it was held that an injunction order, though more extensive in its restraints than the prayer of the complaint, is not for that reason void but must be obeyed. And in the case of the *Atlantic and Pacific Telegraph Company agt. Baltimore and Ohio Railroad Company et al.* (46 N. Y. Supr. Ct. R., 377) it was held that the fact that an injunction is too broad and restrains the doing of acts which the court has no jurisdiction whatever to restrain, as well as acts over which the court has jurisdiction, is no excuse for the violation of the injunction by the doing of the acts over which there is jurisdiction.

In view of these authorities it can make no difference in the case at bar, so far as the question of jurisdiction is concerned, that the order of injunction as granted was too broad, or that the learned judge who granted it erred as to the measure of relief thereby granted, or that it was subsequently determined on a hearing of all parties, and a thorough inspection and examination of the papers and a searching analysis of their contents, that no injunction should have been granted.

In the fourth place the defendant claims that the injunction was null and void because no complaint accompanied the papers upon which it was granted. As already stated this failure to include a complaint constituted the ground upon which the injunction was vacated by judge TRUAX. But did it constitute a jurisdictional defect?

The Code of Civil Procedure provides that a temporary injunction may be granted by order: 1. Where it appears from the complaint that the plaintiff demands and is entitled to a judgment against a defendant restraining the commission or continuance of an act, the commission or continuance of which, during the pendency of the action, would produce injury to the plaintiff (*sec.* 603); and 2. Where it appears by affidavit that the defendant, during the pendency of the action is doing, or procuring or suffering to be done, or threatens, or is about to do, or to procure or suffer to be done, an act

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violation of the plaintiff's rights, respecting the subject of the action, and tending to render the judgment ineffectual, &c. (*Sec. 604*).

Thus, in a case under section 603, the right to an injunction depends upon the nature of the action and is to appear from the complaint, while in a case under section 604 the right to an injunction is extrinsic to the cause of action and is to appear by affidavit. The consequence is that even if, in all cases falling within section 603, the presentation of a complaint drawn up in due form were necessary, the court or judge, upon an application for an injunction, would have to determine whether the particular action in which the application is made falls within section 603 or 604, and to determine the necessity of a formal complaint accordingly. If then there be jurisdiction of the subject-matter of the action, within the rule heretofore ascertained, an erroneous decision as to the necessity of a formal complaint would not deprive the court or judge of jurisdiction in the absence of an express statutory provision declaring void all acts done under or in consequence of such erroneous decision. No such statutory provision exists. On the other hand it should be considered that under section 416 an action is commenced by the service of a summons alone; that under section 399 an attempt to commence an action in a court of record is, in certain cases, equivalent to the commencement thereof against each defendant when the summons is delivered, with the intent that it shall be actually served, to the sheriff; that section 607, in general terms and without limitation or qualification, prescribes that an order of injunction may be granted where it appears to the court or judge by the affidavit of the plaintiff or any other person that sufficient grounds exist therefor; and that section 608, in express and general terms and without limitation or qualification, provides that the order may be granted to accompany the summons, or at any time after the commencement of the action and before final judgment.

In construing these provisions together and giving due force

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and effect to each and every one of them, but keeping at the same time in mind the principles which determine the question of jurisdiction over the subject-matter of an action, the conclusion is inevitable that while in a case falling within section 603, which undoubtedly applies to the case at bar, the court or judge as a matter of orderly practice should insist upon the presentation of a formal complaint at the time of the application for an injunction, a failure to do so on granting the injunction though it may constitute ground for a subsequent motion to vacate, is not a jurisdictional defect which renders the injunction *ipso facto* void.

Section 603 was taken from the first paragraph of section 219 of the first Code, which also demanded that the right to injunctive relief should be apparent from the complaint. In a number of cases which arose under that provision, the courts differed as to the necessity of a formal complaint to sustain the injunction. But while in some such necessity was insisted on, it was held in *Morgan agt. Quackenbush* (22 Barb., 72), and by the general term of the supreme court in *Mattice agt. Gifford* (16 Abb., 247), that the requirement that the right to injunctive relief should appear from the complaint was sufficiently complied with when it was made to appear by affidavit what the allegations of the complaint in that respect were or would be. These two cases were never overruled, and even in the cases in which the contrary was held, nothing can be found which is in direct support of the claim that an injunction granted in the absence of a formal complaint was for that reason alone null and void, because made without jurisdiction. As already shown the Code of Civil Procedure left the question where it stood before.

Upon the whole I am of the opinion that while judge TRUAX had the power to vacate the order of injunction for the reason that the proper practice had not been observed by the plaintiffs in the procurement of it, judge BEACH was without jurisdiction in granting it. The order therefore is not null and void *ab initio*.

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The examination so far made sufficiently establishes that in every aspect that can be taken of the case judge BEACH had sufficient jurisdiction to grant an order of injunction in it, and that consequently the injunction he granted was valid in law as long as it remained in force, and that the defendant had no right to disobey it. The question of propriety arising from the fact that the learned judge referred to made an order in an action about to be commenced in this court without any proof before him that the judges of this court were inaccessible, does not in anywise impair his jurisdiction in the premises. And the order having been made in the exercise of jurisdiction which attached, it became by operation of law the lawful mandate of this court, just as in the case of *The People* agt. *Dwyer* (90 *N. Y.*, 402), the order of the county judge became the lawful mandate of the supreme court.

The matters thus established fully dispose of the complaint made by the defendant, that the granting of the injunction was an enormous abuse of the judicial power. But as this complaint was not only indorsed, but also seriously and warmly pressed, by the learned counsel for the defendant in a manner which aroused public attention and great public interest, some additional remarks are called for.

In this country the security of life, liberty and property depends upon the respect which is paid by all classes to the law, and everything and everybody is in some form or other subject to the law. Municipal corporations constitute no exception. Though perhaps the action of the mayor of the city of New York in the matters relating to the appointment of such officers as he has the power to appoint, is not so much the exercise of a privilege or franchise, as judge TRUAX seems to have held, as the exercise of a power and duty conferred and imposed by statute, it is nevertheless, a power and a duty of a kind which, not being of a legislative character, has at all times, on the application of a party individually aggrieved, been subject to judicial scrutiny, not for the purpose of

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directing it affirmatively, but to prevent abuse. This fully and clearly appears from the decisions in *Davis* agt. *The Mayor, &c.* (1 *Duer*, 451); *The People* agt. *Compton* (*Id.*, 512); *The People* agt. *Sturtevant* (9 *N. Y.*, 263); *The People* agt. *Dwyer* (90 *id.*, 402).

Even state officers constitute no exception to the rule. They may be enjoined in a proper case from the performance of their duties or from executing the provisions of a statute, and, if the case is a proper one, all that the law requires is that the injunction shall be granted by the supreme court, at a general term thereof and upon notice to the officer or board to be restrained (*Code of Civil Pro.*, sec. 605).

Since the decisions in *Davis* agt. *The Mayor*, *The People* agt. *Compton* and *The People* agt. *Sturtevant*, and with full knowledge thereof as must be assumed, the legislature passed the so-called tax-payers' acts heretofore referred to, and by them extended the right of action against municipal corporations and the officers therein specified, to a class of plaintiffs who represent no special private grievance, but only one which they have in common with all others belonging to or falling within the same class. This at once disposes of all the objections raised by the defendant to the standing of the plaintiffs in court. Upon an examination of these acts it will be found that since 1872, when the first of these acts was passed, the right of action itself was greatly enlarged. Originally the right of action given by the act of 1872 extended only to the prevention of waste or injury to corporate property or funds. In 1881 it was so far extended as to include the prevention of any illegal act. As the right of action was thus enlarged, the duty imposed on the courts to grant injunctions was correspondingly increased. The courts did not seek this increase of jurisdiction. They were not even consulted about it. If it is not proper that they should have it, the legislature may as well ought to take it away again. At all events the remedy is w

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the legislature, and all complaints on that score should be addressed to that body. While the duty remains cast upon the courts to entertain such suits, and to grant injunctions therein, they are bound to obey the will of the sovereign power of the state in the premises. All they can do is to require full and competent proof, and to hold plaintiffs to strict practice. The officers of municipal corporations, and all other officers covered by the acts referred to, will do well hereafter to bear these matters in mind and to regulate their official conduct accordingly.

Having shown that the order of injunction was valid and that it should have been obeyed, it now becomes material to inquire into its violation and the manner in which and the circumstances under which it was violated.

It was served with the other papers hereinbefore enumerated upon the defendant as mayor, and upon each of the other defendants herein who were aldermen, on the 30th of December, 1884. On the same day the bond given by the plaintiffs and approved by judge BEACH was filed in the county clerk's office. The injunction enjoined and restrained the appointment or nomination, and the confirmation of any nomination, of any person to the office of commissioner of public works or the office of counsel to the corporation until the further order of this court to be made and entered upon a hearing to be had the next day, namely, December 31, 1884, at eleven o'clock in the forenoon of that day, at a special term of this court. At the time and place specified the motion for the continuance of the injunction was duly argued on behalf of the plaintiffs, and opposed on behalf of the defendant Edson, as well as on behalf of certain others of the defendants, before judge TRUAX, as already stated. The defendant Edson offered no proof in denial of the charges made against him. Some of the aldermen did. The arguments on the motion were concluded at four P. M., on the 31st of December, 1884, and the judge reserved his decision. Thereupon, a little later on the same day, and before any decision had been rendered, the

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defendant Edson sent to the board of aldermen, then in session, the following official message, viz.:

"MAYOR'S OFFICE,
"NEW YORK, December 31, 1884. }

"*To the Honorable the Board of Aldermen:*

"I am advised by the counsel assigned me by the counsel to the corporation that the injunction served upon myself in the case of *Roosevelt and others agt. The Mayor and Aldermen*, restraining my nomination to your honorable body of persons to fill the vacancies now existing in the public offices of this city is void.

"I therefore send you the accompanying communications.

"FRANKLIN EDSON, *Mayor.*"

In the accompanying and some subsequent communication the defendant withdrew the name of Fitz-John Porter as commissioner of public works and nominated and appointed Rollin M. Squire to be commissioner of public works and William Dorsheimer to be counsel to the corporation. The board of aldermen confirmed the nomination of Squire and rejected the nomination of Dorsheimer.

This action was a direct violation of the order of injunction, and by such violation the object of the action and the plaintiffs' remedy herein have been wholly defeated, at least so far as the office of commissioner of public works is concerned. The next inquiry, therefore, must be whether the defendant Edson has established any excuse of which the law can take cognizance. He admits that he took the action complained of, but insists that in taking it he was not actuated by any intention of violating any legal order of this court, or of any judge thereof, or of any judge having authority to make the order of injunction. This is mere legal quibbling. The order served upon him, as already shown, was legal; it was the mandate of this court, and the action taken by him was a direct violation of it. Under these circumstances the rule must be enforced which is elementary and alike applicable to

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civil and criminal proceedings, that every man is conclusively presumed to foresee, and consequently must be held responsible for, the direct and natural consequences of an act purposely done.

He says that vacancies existed in the office of commissioner of public works and the office of counsel to the corporation, which, under the statute, it was his duty to fill. The offices were not actually vacant. The incumbents held over until their successors should be lawfully appointed. It was no more his duty to fill such vacancies than it was the duty of the judge under another statute, upon a proper application, and upon proof that the action proposed to be taken by the defendant was corrupt and consequently illegal, to restrain him from filling them. Each had a duty to perform and each had rights which the other was bound to respect. Of course a long list of cases may be cited in which the courts have said that a court will not interfere with the exercise of a discretionary power lodged by law in a public officer by substituting its own judgment for his, and the cases cited by the learned counsel for the defendant belong to this class. But what was thus said, was said after an actual interference to an extent which, upon examination, satisfied the court that it ought not to interfere any farther; and even then, in the majority of cases at least, the concession was made that if the evidence had been strong enough to establish the necessity for further interference to prevent abuse, injustice, oppression, the violation of a trust, or the consummation of a fraud, the court would have had the power to proceed farther and would have exercised the power. These cases simply hold that courts will not restrain the erroneous exercise of discretion lodged by law in a public officer as long as he acts honestly, and they therefore do not apply to a corrupt and illegal exercise of discretionary power. They are all cases which occurred prior to 1881, and they do not affect the question of jurisdiction which is decisive in the case at bar. For present purposes it is sufficient to say that if no power whatever had ever existed

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in a court of equity prior to 1881 to restrain the corrupt and illegal exercise of discretionary power vested in a public officer, it was expressly conferred by the statute passed in that year.

He says that his term of office as mayor expired on the 31st of December, 1884, and that he could not wait until the rendition of a decision upon the motion heard on that day. From the report of the case of *The People agt. Compton et al.* (1 *Duer*, 512), it appears that in that case alderman Sturtevant made a similar plea (p. 529) and that it did not avail him. Moreover, in the present case, the situation of affairs on the 30th and 31st days of December, 1884, was in a great measure created by the defendant himself. The vacancies occurred on December 10, 1884. By delaying decisive action until the very close of his term, the defendant had aroused public suspicion that he had other motives than a regard for the interests of the municipality he represented.

He says that he was advised by counsel and believed that the order of injunction was null and void, and that he acted upon such advice and belief. That this is not an answer to the proceeding for contempt has been repeatedly held (*Hawley agt. Bennett*, 4 *Paige*, 163; *Rogers agt. Paterson*, *Id.*, 450; *Lansing agt. Easton*, 7 *id.*, 364; *The People agt. Compton*, 1 *Duer*, 512). Upon this point *DUER*, J., in pronouncing the judgment of the court in the case last referred to, said: "While upon this subject, we deem it necessary to observe that the advice of counsel, when stated in general terms, as it here is, will never be accepted by this court as excusing or palliating a contempt which is otherwise manifest or proved. The advice, when thus stated, will never be permitted to affect our decision. To enable us to regard it at all, the names of the counsel must be given and the information that was laid before them, and the exact import of their advice be fully stated. If the advice was written, the writing must be produced; if oral, the fact that it was given, and its precise import, must be verified by the affidavits of the coun-

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sel who gave it. The propriety of these rules and the necessity of adhering to them will be doubted by none who have any knowledge of the difficulties that beset a court in the due administration of its justice and of the means too frequently employed, by a suppression of truth, to evade its authority."

And as to the belief of a party proceeded against, the learned judge referred to, said: "He who resists the order or process of a court of justice, trusting to his own belief of its want of jurisdiction, acts, in all cases, at his own peril, and when he is proved to be mistaken is, in all cases, justly punished. And I add that it is upon this principle alone that the supremacy of the law, and the just authority of courts of justice can be maintained."

The defendant now here advances the excuse that he acted under the advice of counsel in general terms only. The precise import of the advice, and the grounds upon which it was given, are not clearly set forth. It does not appear whether the advice was in writing or oral, and neither writing nor affidavit by counsel has been submitted. Under these circumstances the case is fully controlled by the authorities cited. The most I can do is to consider the fact that the advice was given as claimed and believed, and as an extenuating circumstance to be considered in meting out punishment.

The defendant, by way of excuse, reiterates the fact that the injunction was subsequently vacated by judge TRUAX. From what I said in the beginning as to the effect of this decision upon the present motion, it sufficiently appears that the claim cannot be accepted as a valid excuse for a deliberate violation of the injunction while it was alive, and mere repetition would answer no useful purpose.

And finally the defendant, in his affidavit, says that, in bringing the action, the plaintiffs were actuated by improper motives, and in this connection he denies that on the hearing before judge TRUAX he omitted to deny, viz., the truth of "all the charges of corruption and illegality made against him

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of the motion now when the adjunction was granted. He then stated that his last motion in this case is to the real merits of the action. That this cannot be done, I think I so clearly demonstrated, and I feel confident and authorized, in the course of my discussion of the question of jurisdiction, that no further remarks are necessary. The result is that none of the defenses that have been advanced and considered are any longer available in law.

Before proceeding to a final adjudication, however, it seems necessary to pause for a moment to notice the distinction between criminal contempt and proceedings as for contempt in civil cases, and to consider what remains to be done. The Revised Statutes make, and the Code of Civil Procedure preserved, such distinction. In *The People vgt. Dwyer* 90 N. Y. 242, FISH, J., says upon this point: "As it respects disobedience to the order of a court, the sole difference appears to be that a 'willful' disobedience is a criminal contempt, while a mere disobedience by which the right of a party to an action is defeated or hindered is treated otherwise."

A very thorough and elaborate discussion of the same question, as it stood under the Revised Statutes, may be found in *The People vgt. Compton* 1 Duer, 512.

Proceedings for contempt are now regulated by the Code of Civil Procedure. In addition to the distinction already pointed out a further distinction is as follows: In a proceeding as for contempt of court other than a criminal contempt, if an actual loss or injury has been produced to a party by reason of the misconduct of the offender, a fine sufficient to indemnify the aggrieved party must be imposed upon the offender; but where no actual loss or injury has been shown, the fine which may be imposed must not exceed the amount of the complainant's costs and expenses, and \$250 in addition thereto (Sec. 2234). In a proceeding to punish for a criminal contempt the punishment may be by fine not exceeding \$250, or by imprisonment not exceeding thirty days in the county jail, or both, in the discretion of the court (Sec. 9).

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In the case at bar the plaintiffs do not claim that they sustained any actual loss or injury. Their motion is that the defendant be punished for a criminal contempt under subdivision 3 of section 8, which makes "a willful disobedience to its lawful mandate" a contempt of court.

Upon such a proceeding the party charged must be notified of the accusation, and have a reasonable time to make a defense (*Sec. 10*). To bring him before the court one of two methods of proceeding must be adopted, viz., he must be brought in either by and under an attachment to answer for the alleged contempt, in which case interrogatories must be filed to be answered by him; or by an order duly served upon him requiring him to show cause why he should not be punished for the alleged offense, in which case the question is determined upon affidavits (*Sec. 2269*).

The defendant now here was personally served with the order requiring him to show cause why he should not be punished for the violation of the injunction, and with the affidavits and other papers upon which the said order was made. He appeared, submitted his proofs and was heard in opposition. Under these circumstances it is not necessary that he should be brought once more into court on an attachment, and that interrogatories should be administered to him prior to a final adjudication upon the contempt charged against him (*The Mayor, &c., of N. Y. agt. The N. Y. & Staten Island Ferry Co.*, 64 *N. Y.*, 622).

Having arrived at this point the case is now ripe for a final adjudication.

The defendant deliberately chose to place himself towards this court in a relation of direct and open hostility. Admitting the service of the order of injunction upon himself which, upon its face, showed that it was granted in an action brought in this court, and correctly construing it as commanding him to desist from filling the vacancies in the two offices referred to, he chose to treat it as an illegal assumption of judicial authority, and thereupon he proclaimed in an

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official message to the board of aldermen that it was void. All this was done in the face of an express provision of law, that the jurisdiction of this court, in an action or a special proceeding brought therein, must always be presumed (*Code of Civil Pro., sec. 266*). He thus publicly raised an issue with this court, which this court is compelled to meet and to determine. For obvious reasons it would be desirable were it possible that such issue should be determined by some other tribunal. But as no such transfer can be made of the jurisdiction of this court, I have no right to shrink from the performance of the duty which the law casts upon me.

None of the excuses advanced by the defendant having any force or validity in law, and all his objections, both of form and substance, having been found untenable, and nothing appearing which could furnish a respectable apology for the omission of the court to take such notice of the defendant's misconduct as is due to the interests of the public and to a proper administration of justice, the defendant, for the reasons hereinbefore stated, must be adjudged to have been guilty of a willful disobedience to the lawful mandate of this court in deliberately violating the order of injunction served upon him, and consequently guilty of a criminal contempt of this court. And now it becomes my painful duty to decide what the punishment shall be. In the performance of that duty I deem it fit and proper to recall to mind from the sterling remarks made by judge DUEK in the *Compton case* the following sentences, viz.: "Our country is great, flourishing and prosperous, because the people has at all times, in the exercise of its own sovereignty, been accustomed and has rejoiced to confess the sovereignty of the law as limiting and controlling its own. It is so because we long have been, still are, and I trust will ever remain, a law-reverencing, law-obeying and law-abiding people. But it is manifest that this deep reverence for the law, this prompt and cheerful submission to its dictates, this fixed resolve to abide its determinations, by which as a nation we have hitherto been distinguished, are insepara-

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bly connected with the confidence which is reposed in those by whom the law is administered, and can, in reality, subsist no longer than while that confidence is felt and maintained. Hence, none are more dangerous enemies to our country and its institutions, by whatever pretext they may seek to veil their conduct, than those who seek to destroy or impair this necessary confidence by rash denunciation, groundless imputations, open disrespect and public disobedience. The inevitable tendency of such proceedings is to weaken and unsettle our government in its very foundations, and in every branch of its administration. They strike at the root of our national prosperity, and poison and corrupt the fountain from which all our blessings flow, the supremacy of the law, manifested and sustained by the ready submission of all to its dictates and authority."

The evil example thus referred to is, as was said by judge BOSWORTH in the same case, still more pernicious in its tendency when set by a man invested with authority who, by virtue of his office, is a conservator of the public peace.

The defendant, as mayor, was the chief executive officer of the corporation of the city of New York. He was elected to that high office by the votes of a majority of the electors of this great city. He, above all others, should have set an example of devotion and submission to the supremacy of the law as administered by the tribunals created by the sovereign power of the state for that purpose. Occupying such a high position, his willful and public disobedience to the positive mandate of a court of general jurisdiction is an act of far-reaching consequences. Under these circumstances, and inasmuch as neither the sentence by this court in the *Compton case* of alderman Sturtevant to imprisonment for fifteen days and the payment of a fine of \$250 into the city treasury, and of a further fine of \$102.07 to the relators for their costs and expenses, nor the sentence by the supreme court in the *Dwyer case* of each of the seventeen aldermen to imprisonment for thirty days and the payment of a fine of \$250,

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deterred the defendant from defying the authority of this court, the case demands the infliction of the highest punishment authorized by law, unless mitigating circumstances can be found that can properly be considered.

Upon this point I have, after due deliberation, come to the conclusion that some of the matters urged as an excuse, but rejected as insufficient in law for that purpose, ought to be accepted in mitigation. The fact cannot be denied that the order of injunction was granted under circumstances which made it difficult to ascertain whether there was or was not jurisdiction, and upon being advised by counsel that the order was void, the defendant may well have believed it. Moreover the practice of the plaintiffs themselves in obtaining the injunction, was so faulty and irregular as to lend color to the theory that the order was invalid. Upon the whole I am charitable enough to think that the defendant actually believed that the order was void.

But after giving to the defendant the fullest benefit of every extenuating consideration that can be presented, the case still remains one which calls for substantial punishment.

I therefore direct that for the willful disobedience, and the contempt of which the defendant stands adjudged guilty, he be imprisoned in the county jail for the period of fifteen days, and that, in addition thereto, he pay a fine of \$250.

And I further direct that the order to be entered, and the commitment to be issued, be presented for settlement on a notice of two days to the attorneys for the defendant.

In re Cedar Park.

SUPREME COURT.

In re CEDAR PARK.

Railroads — Liability to assessment for local improvements — Errors of commissioners of assessment which justify interference by the court.

The lands of a railroad company are *prima facie* liable to be assessed for the costs of local improvements, the presumption being that they are benefited in common with all other lands within the area of assessment for such improvements.

If the commissioners of assessment have discretion in determining what lands are benefited, it should be shown by their report why they have omitted any, and such omission of lands without explanation is an error in principle, justifying interference by the court.

New York Chambers, March, 1885.

MOTION to confirm report of commissioners of assessment.

E. H. Lacombe and *Arthur Berry*, for the motion.

John C. Shaw, for Bradley, McGrath and Astors, contestants.

William H. Lee, for Bryan McKinney, contestant.

Fordham Morris and *Truman H. Baldwin*, for other contestants.

LAWRENCE, J.—There is one ground on which the motion to confirm the report of the commissioners in this case should, I think, be denied. The lands belonging to the New York and Harlem Railroad Company and to the Spuyten Duyvil Railroad Company, which are embraced within the area of assessment, have been wholly omitted from the assessment. There is nothing in the report or in the proceedings of the commissioners which shows why these lands were omitted from the assessment. In the absence at least of some explanation as to the reasons of the commissioners for omitting to assess these lands, it seems to have been an error in principle to omit them. It has frequently been determined in this state

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that such lands were liable to be assessed and taxed as real estate (*People* agt. *The Assessors of the town of Carrolton*, 52 Barb., 105; *People* agt. *Dunkirk Railroad Co.*, 46 N. Y., 46; *People* agt. *Commissioners of Taxes, &c.*, 42 N. Y., 459). And the liability of such lands to assessment for the purposes of ordinary taxation is now declared by statute (*See Laws of 1881, chap. 293*).

It was held in the case of *The Troy and Lansingburgh Railroad* agt. *Kane* (9 Hun, 506), that where, under the provisions of a city charter, the expense of making certain local improvements was authorized to be assessed upon the property benefited, the expense of constructing the sewer in one of the streets of the city might be assessed upon the tracks, sleepers and rails of a railway company (*See, also, People ex rel. The Dunkirk, &c., R. R. Co. agt. The City of Dunkirk*, 20 Weekly Digest, 230).

And as to in the case of *Hassan* agt. *The City of Rochester* (67 N. Y., 528), where, by the terms of a city charter, lands exempt from taxation by the general laws of the state, were authorized to be assessed for the expenses of local improvements, and where lands belonging to the state within the prescribed limits of the assessment were entirely omitted by the assessors, it was held that the assessors erred, and that the collection of the assessment would be restrained for such error. It was also held in that case that in the absence of proof it would not be assumed that the plaintiff's taxes would only be increased to an amount so trifling that the court would not interfere, but that the presumption was the other way. This case seems to me to be strongly in point in the case now under consideration. We cannot assume in this case that the assessment of the parties resisting the confirmation of this report will only be slightly increased by the omission to assess the lands owned by the railroad company. It is also strongly in point as showing, in the absence of proof to the contrary, that the omissions to include those lands in the assessment was an error in principle on the part of the commissioners. The

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questions involved in this case appear to have been frequently discussed in the courts of other states. In the case of the *Peru and Indianapolis Railroad Company* agt. *Hanna* (68 *Ind.*, 563), it was held that the track of a railroad company which borders on a street is properly assessable for its due proportion of the cost of the improvement of such street under an ordinance of the city. In the case of the *City of Chicago* agt. *Baer* (41 *Ill.*, 306), it was held that a street railway company occupying a portion of the street with their track, and in the use thereof, under a charter and under a contract with the city authorities, have a franchise and a right of occupancy, which is a property of a character to be substantially benefited by the paving of such street, and that, in proportion as it is thus benefited, it should contribute its share to the cost of the improvement in common with the other property upon the street.

In the case of the *City of New Haven* agt. *Fair Haven and Westfield Railroad Company* (38 *Conn.*, 422), it was held that the rails, sleepers, ties and spikes of a horse railroad company so laid into and attached to the soil of the street as to become a part of the realty were real estate, and as such liable to assessment for the expenses of paving the street through which they were laid (*See page 431, and cases cited*). From these cases it will be seen that the lands of a railway company are *prima facie* liable to be assessed for the costs of local improvements. The presumption is, I think, that they are benefited in common with all other lands within the area of assessment by such improvement (*See Hassan* agt. *City of Rochester*, 67 *N. Y.*, 529). The presumption also is that by omitting such lands from the assessment the burden of other parties is substantially increased (*Hassan* agt. *City of Rochester, supra*). If, as the lands were *prima facie* liable to be assessed, there was any reason for not making such assessment, such reason should have been stated in the report.

I am well aware of the decisions in this state as to the force and effect of the reports of commissioners in cases of this

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description, and that for a mere error in valuation such reports will not be disturbed. But it has been frequently held that if an error in principle appears in the report of such commissioners the report will not be confirmed (*Matter of Furman Street*, 17 Wend., 663, remarks of BRONSON, J., pp. 663, 664; *Matter of Central Park Extension*, 16 Abb., 56; *Matter of Comrs. of Central Park*, 51 Barb., 277, and cases cited).

In the *Matter of Furman Street* (*supra*), BRONSON, J., says: "Not only the corporation, but the individuals who may be affected, are entitled to a full and explicit statement of the grounds on which the commissioners proceed. This course is necessary to protect parties in the enjoyment of their rights and to afford them ample means for seeking redress when they think themselves injured. * * * It is the more important that the commissioners should state explicitly the grounds on which they proceed from the consideration that the reviews on appeal can, for the most part, extend only to errors in principle."

In the absence of the explanation it is apparent, I think, that an error in principle has been committed in this case. Even if it be true, as contended by the learned counsel to the corporation, that under the statute the commissioners have a discretion in determining what lands are benefited by the improvement, it should be shown, I think, by their report and proceedings, why they have omitted any particular lands embraced within the area of assessment from such assessment.

To illustrate: If there were within the area of assessment two adjacent pieces of land of equal dimensions belonging to individuals, and the commissioners should assess one piece for benefit, omitting the other from assessment entirely, the court would be obliged to say, I think, that the commissioners had erred in so doing, unless some explanations were given for the omission. Should any other rule be applied to this case because the omitted lands are used for railway purposes? I think not. Suppose that all the lands embraced within the area of assessment were used for railway purposes, would

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the commissioners be authorized to report that no assessment whatever for benefit could be imposed solely in consequence of such use? And if such report were made without explanation, would the court, on a mere presumption that no benefit would be derived from the improvement, be obliged to sustain such report? Clearly not. It may well be that, in consequence of the nature of the use of the lands, the resulting benefit from the improvement may be less than in the case of lands belonging to a private citizen. But that fact should be made explicitly to appear (*See Matter of Furman Street, supra*).

The decision of justice POTTER in December, 1882, *In the Matter of the Spuyten Duyvil Parkway*, is not in point, for the reason that the lands of the railroad company in that case were not within but without the area of assessment (See memorandum of corporation counsel in this case).

The motion to confirm the report of the commissioners will, therefore, be denied.

SURROGATE'S COURT.

In the Estate of ANN VOORHIS, deceased.

Code of Civil Procedure, section 829 — When legatees under a disputed will, incompetent under this section, to testify in a proceeding for the probate thereof.

In the trial of a proceeding for the probate of a decedent's will, one who is named as legatee in the disputed paper is incompetent, under section 829 of the Code of Civil Procedure (save in the cases therein excepted), to testify in his own interest concerning a personal transaction or communication between himself and the decedent.

New York County, March, 1885.

ROLLINS, S. — Section 911 of the Code of Civil Procedure provides that a deposition taken without the state, pursuant to article 2, title 3, chapter 9, may be read in evidence by

In the Estate of Ann Voorhis, deceased.

either party at the trial, subject to such objections to the competency of the witness or of the testimony as might be made if the witness were then under oral examination.

Certain portions of the testimony of Ann E. Blake, whose deposition was lately taken in this proceeding by order of the surrogate, are objected to upon the ground that they concern matters about which the witness is made by section 829 of the Code incompetent to testify.

She is named as legatee in an instrument whose title to probate is still the subject of controversy, and the testimony which is here challenged relates to personal transactions and communications between herself and the decedent. The language of section 829, omitting such portions as are foreign to the present inquiry, is as follows:

"Upon the hearing upon the merits of a special proceeding, a person interested in the event * * * shall not be examined as a witness in his own behalf or interest * * * against any person deriving his title or interest from, through or under a deceased person concerning a personal transaction or communication between the witness and the deceased person."

Now, is Mrs. Blake "a person interested in the event" of this probate proceeding, and has she been "examined in her own interest," and is the contestant "a person deriving title or interest from, through or under" this decedent? The first two of these questions it is not difficult to answer. Mrs. Blake is named as a legatee in the very instrument that is sought to be proved by her testimony. If that instrument shall be admitted to probate she will become entitled to her legacy. On the other hand, should Mrs. Voorhis be discovered to have died intestate, Mrs. Blake will take no portion of this estate. It is very clear, therefore, that within the meaning of section 829 the witness is interested in the event of this proceeding, and that when she gave the testimony objected to she was under examination in her own interest. But does this contestant fall within the category of persons deriving title or interest from, through or under the decedent?

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Strictly speaking, it is only by the result of the very probate controversy in which this disputed evidence is offered that it can be ascertained whether the contestant has any title or interest whatever in this estate; but I think that the expression "deriving title or interest" should be construed as if it read "claiming to derive title or interest." Such an interpretation is quite in harmony with that which the courts have sanctioned in construing other parts of the same section. For example, there is included in the class of testimony whose introduction the section disallows, testimony "against executors," and it has been held that this word "executors" is broad enough to embrace persons named as such in a disputed will, even in advance of the admission of such will to probate, and even for the purposes of the trial of the very proceeding brought for obtaining such probate (*Schoonmaker* agt. *Wolford*, 20 *Hun*, 166). The case just cited is applicable to another phase of the present contention, and upon its authority alone I should be inclined to exclude the testimony of Mrs. Blake, so far as it relates to any personal communications and transactions between herself and the decedent (*See, also, Snyder* agt. *Sherman*, 23 *Hun*, 139, and *Lee* agt. *Dill*, 39 *Barb.*, 516, and *Matter of Smith*, 95 *N. Y.*, 516).

The case last cited was a proceeding for the probate of a paper purporting to be a decedent's will. The instrument named as executor and as principal legatee the person who afterwards became its proponent. Its validity was contested by a legatee under other testamentary papers bearing an earlier date. At the trial before the surrogate the proponent had been permitted to testify in regard to certain personal transactions and communications between himself and the decedent. To this testimony the contestant had objected upon the ground that it fell under the ban of section 829. The overruling of this objection and the reception of the testimony were held by the court of appeals to have been erroneous. Says *ANDREWS, J.*, pronouncing the opinion of the court: "We think the contestant was a person deriving an interest under

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the deceased within the meaning of this section (*i. e.*, *sec.* 829). It is true the interest was not fixed or certain. If the will propounded for probate is valid she has no interest, and, if it should be set aside, it does not follow that the will under which she claims will be established. * * * Her interest, though contingent and uncertain, was derived under the deceased. Her position, though not precisely analogous, is similar to that of heirs or next of kin contesting the will of their ancestor, *and it can scarcely be doubted that they would be within the protection of the section.*"

It is claimed by counsel for certain residuary legatees, at whose instance this witness was examined, that so far as relates to probate controversies section 829 has been repealed or modified by section 2544. The latter section is as follows: "A person is not disqualified or excused from testifying respecting the execution of a will by a provision therein, whether it is beneficial to him or otherwise." I do not regard these words as conveying any intimation that such a person shall not, in the same manner and to the same extent as other persons, be subject to the limitations of section 829.

So far as the deposition of Mrs. Blake relates to personal communications or transactions between herself and the decedent it cannot therefore be received in evidence.

N. Y. SUPERIOR COURT.

OTTO GEISENHEIMER and THEODORE GRAVEN, respondents,
agt. CHARLES C. DODGE and ANSON POND, impleaded
with another, appellants.

Corporations—Action against trustees, to recover debts due from the company on the ground of failure to file annual reports—Parties—Code of Civil Procedure, sections 456, 837—When part of the trustees may be proceeded against and the rest left out—When witness not excused from testifying.

In an action against trustees of a corporation, where a suit is brought against three trustees, and the action is brought to trial against two an

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two are served, the defendants and the plaintiffs stand in the same relation as if only two had been named in the summons and complaint.

Under the provisions of section 456 of the Code of Civil Procedure, in actions where the complaint alleges the defendants to be severally liable, part may be proceeded against and the rest left out. An action under chapter 510 of the Laws of 1875, with an allegation in the complaint demanding a several judgment, is an action where the parties are alleged to be severally liable.

Although a defendant may be excused from answering questions, under the provisions of section 887 of the Code of Civil Procedure, as to penalties, still this action is not such a penalty as will excuse the defendant from answering questions which would tend to expose him to a verdict under chapter 510 of the Laws of 1875.

General Term, December, 1884.

Before SEDGWICK, C. J., VAN VORST and FREEDMAN, JJ.

THIS is an appeal from a judgment, entered on the report of a referee.

This action was brought against the defendants, trustees of the Pyrolusite Manganese Company, a corporation organized under the general manufacturing act, to recover a debt due from the company on the ground of an omission to make, file and publish the annual report required by the twelfth section of said act. Defendants Dodge and Pond were served with summons, and by stipulation the issues were referred to be heard and determined.

The plaintiffs were copartners, and on the 15th day of December, 1881, loaned to the company acting through defendant Dodge, a sum of money upon the security of a consignment of manganese ore from the company to the Paris correspondent of the plaintiffs. Upon the sale of the ore there was a deficiency, and on 21st March, 1882, a balance of \$290.56 was ascertained to be due from this company to plaintiffs. That defendant Dodge was a trustee of the company during 1881 and 1882 is conceded.

In July, 1881, the trustees were Edward H. Woodward, Mrs. Pauline Woodward and defendant Dodge. A meeting

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was held July 12, 1881, and Mrs. Pauline Woodward presented her resignation as trustee, to take effect "on the legal election of a fourth trustee." Her resignation was accepted. Arthur T. Woodward was elected such fourth trustee, and defendant Pond was elected trustee in place of Mrs. Woodward, resigned. No certificate of the increase of the number of trustees was however made and filed as required by law.

Defendant Pond was notified of his election and accepted the office. In June, 1882, he joined with defendant Dodge in acting as trustee in petitioning the court for a voluntary dissolution of the company under the statute, and upon this petition the company was dissolved and a receiver appointed in the fall of 1882. The charter election day was December twenty-two of such year.

No annual report was made and filed as required in section twelfth of the act, during the years 1882 and 1883. The case was tried before Ernest H. Crosby, Esq., referee, who wrote the following opinion :

ERNEST H. CROSBY, *Referee*. — The counsel for the defendants Dodge and Pond maintains that as the defendant Woodward was not served with a summons, the plaintiffs cannot recover against the other defendants. This view might be correct if the action were brought on contract, but such is not the case. The cause of action is created by section 12 of the manufacturing act of 1848, as amended, for the recovery of a penalty, and the defendants' liability therefore arises *ex delicto*. The ordinary rules of actions in tort are applicable and non-joinder is no defense (*Strang* agt. *Sproul*, 4 *Daly*, 326, *reversed*, but not on this point). The failure to serve the defendant Woodward is equivalent to his non-joinder as a defendant under section 456 of the Code of Civil Procedure. The complaint brings the action under the provision of section 12 of the act of 1848, as amended by chapter 510 of the Laws of 1875. This section expressly makes the defendants "jointly and severally liable." Hence the defend-

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ants are "alleged to be severally liable," as required by section 456 of the Code, and the plaintiffs may proceed against the defendants Dodge and Pond, as if they were the only defendants named in the summons. The cases cited by the defendants' counsel on this point (*Dean agt. Whiton, &c.*), do not bear upon the question. They arose under section 18 of the act of 1848, and the courts treated these actions as if they were brought on contract. There is no similarity between the liability imposed by section 12 and that imposed by section 18 of the manufacturing act. The former is *ex delicto*, and the latter is not.

The only other point in the case calling for comment is the trusteeship of the defendant Pond. The election of Arthur T. Woodward as trustee was not legal, as there was no provision for a fourth trustee. The validity of Pond's election depends upon the resignation of his predecessor Pauline Woodward. Her resignation was "to take effect after the legal election of the fourth trustee." Such "legal election" never took place, and the defendants' counsel contends that consequently she never ceased to be trustee, and there was no vacancy. A resignation signed by a woman must not be construed as rigidly as a more formal document. All the persons interested evidently believed that a fourth trustee, Arthur T. Woodward, had been legally elected. Pauline Woodward's resignation was accepted on this understanding. It does not appear that she ever claimed to be a trustee thereafter. On the contrary, Arthur T. Woodward and the three defendants were from that time trustees *de facto*. The condition precedent mentioned in Pauline Woodward's resignation had occurred according to her intention and that of her co-trustee, and they all seem to have acquiesced in Pond's election to fill her place. Her resignation and its acceptance consequently made an actual vacancy, and Pond became trustee *de jure*. In signing the petition of June 3, 1882, both Pond and Dodge acted as trustees, and this alone, without the other acts testified to, is enough to show that they

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held over after December 27, 1884, when their terms might have expired (*Van Amburgh* agt. *Baker*, 81 N. Y., 46). The fact that they signed this petition appears from Mr. Dodge's testimony and does not depend upon the admission as an exhibit of the petition itself.

On appeal from the opinion of the referee,

Dill & Chandler, for the appellants made and argued the following points:

I. The statute under which this action is brought is a penal statute and all presumptions are in favor of the defendants. Every fact necessary to establish the liability of a trustee in a suit brought under this act must be affirmatively proven by the plaintiff, even to and including those facts which can only be established by proof in the negative (*Whitney Arms Co.* agt. *Barlow*, 68 N. Y., 37; *Bruce* agt. *Platt*, 80 N. Y., 381; *Cameron* agt. *Seamen*, 69 N. Y., 401).

II. The action is in form against three trustees, only two are served. The appellant concedes that if the action had been brought against two alone of the trustees, and a joint and several judgment had been demanded in the complaint, under the authority of *Strang* agt. *Sprowl* (4 *Daly*, 302), the plaintiff would be entitled to the judgment, but the principle of law claimed by the appellant is that when the statute gives a joint and several remedy the plaintiff, by bringing his action against all, elects to treat the liability as joint and waives his several remedy (*Dean* agt. *Whiton*, 16 *Hun*, 204; *Herries* agt. *Platt*, 21 *Hun*, 132). Section 456 of the Code of Civil Procedure does not include this action, because the plaintiff, by bringing his action against all the defendants, elected to take his joint remedy, waived his several remedy and did not allege the defendants to be severally liable.

III. The defendant was called as a witness for the plaintiff and asked to testify concerning his acts as trustee. His counsel asked the referee to instruct the witness that it was his privilege to refuse to testify as to his trusteeship on the ground

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that his answer would tend to expose him to a penal liability. The referee held that the witness was only excused from answering questions which would tend to render him criminally liable. The defendant's liability under the complaint is penal (*Vernon* agt. *Palmer*, 48 *Supr. Ct.*, 231; *Whitney Arms Co.* agt. *Barlow*, 68 *N. Y.*, 37, and cases cited under point 1). The question of privity was duly raised and properly presented by the request of counsel for the witness (who was the defendant), and it was error on the part of the referee to refuse to so instruct (*The People* agt. *Brown*, 72 *N. Y.*, 571; *Close* agt. *Olney*, 1 *Denio*, 319; *Taylor* agt. *Wood*, 2 *Edw.*, 94; *Southart* agt. *Retchford*, 6 *Cow.*, 252). The instruction as given by the referee was error. A witness is excused from giving an answer which will tend to expose him to a penalty or forfeiture (*Code of Civil Pro.*, sec. 837). This is the common-law rule and extends to everything in the nature of a penalty or forfeiture (*Livingstone* agt. *Tompkins*, 4 *Johns. Ch.*, 415; *Henry* agt. *Salina Bank*, 1 *N. Y.*, 83).

Baldwin & Blackmar, for respondents, made and argued the following points:

I. Defendant Pond was a trustee *de facto*, and as such is liable under the act (*Denning* agt. *Puleston*, 55 *N. Y.*, 655; *Reed* agt. *Keese*, 60 *N. Y.*, 616).

II. As to the referee's ruling that defendant Dodge, who was called as a witness, was only excused from answering questions which would tend to render him liable criminally, if the refusal so to instruct was error it was not such error as to justify a reversal, because the defendant Dodge was in no wise injured by it (*Cloyes* agt. *Thayer*, 3 *Hill*, 566; *Foots* agt. *Beecher*, 78 *N. Y.*, 158; 2 *Gra. & Wat. on New Trials*, 634; *Forrest* agt. *Forrest*, 25 *N. Y.*, 510; *Lamb* agt. *Camden and Amboy R. R. Co.*, 2 *Daly*, 475; *Bennett* agt. *Austin*, 5 *Hun*, 538).

III. The defendant claims that the plaintiff, not having succeeded in serving defendant Woodward, cannot proceed

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against the defendants actually served. The rule which defendant relies on is one of contract liability. It is true that when defendants are jointly liable on contract all should be joined, and if jointly and severally liable each should be served separately or all jointly, and if all are joined and part served, judgment may be taken against all to be satisfied out of the property of those served. On the other hand, in actions of tort one or any number can be served in the same action, but judgment can be taken only against those served. This is not an action on contract but on tort (*Miller agt. White*, 50 *N. Y.*, 137; *Jones agt. Barlow*, 62 *N. Y.*, 202; *Strang agt. Sproul*, 4 *Daly*, 302; *Roberts agt. Johnson*, 58 *N. Y.*, 613; *Tingley agt. Walters*, 2 *Sweeney*, 175; *Stannard agt. Mattice*, 7 *How.*, 4; *Code of Civil Pro.*, sec. 456). The non-joinder or non-service of one of the defendants is, therefore, no defense as to the others.

IV. The company was required by the statute, as amended in 1875, to file annual reports after 1876 (*Vernon agt. Palmer*, 48 *J. & S.*, 231).

The general term affirmed the opinion of the referee.

SUPREME COURT.

In the Matter of the Application of MARTIN T. McMAHON, receiver of taxes, respondent, agt. JOHN W. JONES and BENJAMIN P. FAIRCHILD, administrators, &c., appellants.

Taxes and assessments — Personal tax — When administrator individually liable for a tax imposed upon him in his representative character.

In a proceeding by the receiver of taxes to enforce the payment of a tax of \$2,620, in the year 1881, on an assessment of \$100,000 legally imposed upon an administrator of a deceased person, the administrator set up that the deceased resided and died out of the state, but had some personal effects here when he died; that he had no notice of any tax upon the lists in this city, supposing the deceased could not be taxed in this

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state ; that the inventory of the estate, filed in the surrogate's office in New York county, showed \$42,068.81 of assets after payment of debts upon which the tax legally chargeable would be \$1,810 :

Held, that the tax having been imposed before the estate had been settled by the surrogate's decree, it was the duty of the respondent, before making the distribution under it, to ascertain what the liabilities under it were, whether for taxes or otherwise ; that it was too late to question the *quantum* of tax, and that no case was shown for either legal or equitable interference (*Affirming S. C.*, 67 *How.*, 113)

First Department, General Term, January 1885.

Before DAVIS, P. J., BRADY and DANIELS, JJ.

APPEAL from an order of the special term, committing appellant Fairchild for non-payment of personal taxes, &c.

Orlando L. Stewart, for appellants.

John J. Townsend, Jr., for respondents.

DAVIS, P. J.—This case was disposed of at special term in the following well considered opinion of justice LAWRENCE (quoting opinion), (*See* 67 *How.*, 113).

Upon the facts shown, the case is a hard one upon the petitioner, but public policy requires that the laws for securing the payment of taxes should be strictly enforced. The administrators in this case held the legal title of the property embraced in the inventory filed by them with the surrogate. For the purposes of taxation their ownership as administrators was complete under our statutes, notwithstanding the fact that the decedent, before and at the time of his death, was a resident of the state of New Jersey. There is much force in the argument of the counsel for the respondents that the power of the court under section 861 of the consolidation act, as amended by chapter 276 of the Laws of 1883, to reduce a tax, is limited to cases in which it is shown that the person taxed is unable to pay. This court is not thereby authorized to go behind the assessment and try its merits as if presented for review by *certiorari*, and to do that would be to take up on

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the court the powers and duties conferred by law upon the assessors.

We are therefore of opinion that the application was properly disposed of and the order must be affirmed, with ten dollars costs, besides disbursements.

SUPREME COURT.

H. N. GARDNER agt. JOHN W. SCOVILL.

Complaint—Demurrer—Replevin—Title, how should be stated in complaint—Code of Civil Procedure, section 1720.

A complaint in replevin must contain a direct issuable averment of ownership in the plaintiff, and allegations of the evidence of such ownership will not be allowed to take the place of such necessary averment.

Where in a complaint in replevin to recover the possession of personal property it was averred (1), that the defendant detains the property set out in the schedule from the plaintiff; (2), that one Emma N. Scovill (not the defendant) executed and delivered to the plaintiff a chattel mortgage upon the property; (3), that by the terms of the mortgage the plaintiff had become entitled to the possession of the property; (4), that the defendant had its possession; and (5), refused to deliver it to the plaintiff on demand:

Held, that the complaint is fatally defective, because it is not averred that the plaintiff is the owner or has title to the property, nor that he had the right of possession by virtue of a special property therein, as required by section 1720 of the Code of Civil Procedure.

Saratoga Special Term, March, 1882.

DEMURRER to complaint.

John M. Gardner, for plaintiff.

H. B. Cushnevy, for defendant.

BOCKES, J.—The complaint is in replevin to recover the possession of personal property. The objection to the complain

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is that it is not averred that the plaintiff is the owner or has title to the property, nor that he had the right of possession by virtue of a special property therein as required by the Code of Civil Procedure (Sec. 1720). An omission of an averment to the effect that the plaintiff was the owner of the property sought to be recovered, or was entitled to its possession by virtue of a special property therein, has been often held to be a fatal defect in a complaint in replevin (*Bond* agt. *Mitchell*, 3 *Barb.*, 304; *Vandeburgh* agt. *Van Valkenburgh*, 8 *Barb.*, 217; *Pattison* agt. *Adams*, 7 *Hill*, 126; *Scotfield* agt. *Whiteledge*, 10 *Abb. [N. S.]*, 104; *S. C.*, 49 *N. Y.*, 259). This rule of pleading has not been at all changed by the Code of Civil Procedure.

The complaint in this case is plainly defective because of an omission of an averment that plaintiff is the owner of or has title to the property in suit. Such omission is manifest on a brief synopsis of the pleading. It is averred (1) that the defendant detains the property set out in the schedule from the plaintiff; (2), that one Emma N. Scovill (not the defendant) executed and delivered to the plaintiff a chattel mortgage upon the property; (3), that by the terms of the mortgage that the plaintiff had become entitled to the possession of the property; (4), that the defendant had its possession, and (5), refused to deliver it to the plaintiff on demand. Now, here is no averment that the plaintiff owned or had title to the property. It is even averred that the mortgagor had title to or right to mortgage the property, or that she even had its possession. There is no averment in terms of even a wrongful detention of the property, although this would not have cured the difficulty in pleading (*Scotfield* agt. *Whiteledge*, 49 *N. Y.*, 259). In this case it was said by FOLGER, J., that a complaint that did not aver ownership in the plaintiff was fatally defective (10 *Abb. [N. S.]*, 104). In *Vandeburgh* agt. *Van Valkenburgh* (8 *Barb.*, 217), it was laid down that there must be a direct issuable averment of ownership in the plaintiff, and that allegations of the evidence of such ownership

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would not take the place of such necessary averment. This case is distinctly in point on the facts averred as well as on the law. It is sufficient if there be an averment that the goods and chattels were the property of the plaintiff (see cases above cited), but the complaint in this case does not contain this averment. The cases cited by the plaintiff's counsel (*Everett agt. Saltus*, 15 *Wend.*, 474; and *Morris agt. Davidson*, 3 *Hill*, 168) are not in point. There is no averment that the property was taken from the plaintiff, or that he ever had its possession, nor that it had been placed at his absolute disposal as in the case of a consignee. The decision of *Vandeburgh agt. Van Valkenburgh*, above cited, is entirely controlling of this case. The demurrer must be sustained.

Judgment for the defendant on the demurrer, with liberty to the plaintiff to amend the complaint on payment of costs of demurrer.

SUPREME COURT.

ROSE agt. MEYER.

Complaint—Demurrer—Action to foreclose a mortgage—Sufficiency of complaint—Code of Civil Procedure, section 534.

A plaintiff must state his interest or title, even in a suit upon an instrument for the payment of the money only, and such other extrinsic facts as are necessary to enable him to recover.

A mortgage is not an instrument for the payment of money only.

Where in an action to foreclose a mortgage, the allegation of the complaint is that the plaintiff is, by several assignments, which shall more fully and at large appear, reference being had thereto, now the lawful holder and owner of the bond and mortgage above mentioned and described, and is justly entitled to be paid the said principal sum above mentioned, together with the interest on that principal sum from the time above mentioned:

Held, that the complaint is defective; it does not show by whom the assignments were obtained, nor is the defendant apprised of the fact upon which the plaintiff relies to show that he is the owner and holder of the instrument in question.

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Special Term, February, 1885.

LAWRENCE, J.—A mortgage is not an instrument for the payment of money only (*Peyser agt. McCormack*, 7 Hun, 300). It has frequently been held, under section 162 of the former Code and under section 534 of the present Code, that the plaintiff must state his interest or title, even in a suit upon an instrument for the payment of the money only, and such other extrinsic facts as are necessary to enable him to recover. Those sections only relieve a party from setting out such an instrument according to its legal effect (*Bank of Geneva agt. Gulick*, 8 How. Pr., 51; *see, also, Tooker agt. Arnoux*, 76 N. Y., 397). In this case the allegation of the complaint is "that the plaintiff is, by several mesne assignments — which shall more fully and at large appear, reference being had thereunto — now the lawful holder and owner of the bond and mortgage above mentioned and described and is justly entitled to be paid the said principal sum above mentioned, together with the interest on that principal sum from the time above mentioned." No fact is stated in this allegation from which it can be seen how the plaintiff has become an assignee of the mortgage sought to be foreclosed, nor is the defendant apprised of the facts upon which the plaintiff relies to show that he is the owner and holder of the instrument in question. In this respect I think the complaint is defective. In *Thomas agt. Desmond* (12 How. Pr., 321), which was an action for the recovery of money upon a contract between the defendant on the one part, and one Allen and his wife on the other, the complaint alleged a breach of the contract on the part of the defendant, and the only allegation of the title of the plaintiff was as follows: "That the said plaintiff is now the sole owner of the said demand against the said defendant." WELLES, J., in sustaining the demurrer said: "This I do not think is sufficient; it is merely an allegation of a conclusion of law. The defendant has a right to be informed by the complaint how the plaintiff became the owner of the

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demand, whether by purchase, assignment, operation of law, or how otherwise. The same fact or facts should be stated by which it would appear how he became such owner," citing *Russell* agt. *Clapp* (7 Barb., 482); *Bently* agt. *Jones* (4 How., 202); *Murray* agt. *Thomas* (5 How., 14); *Parker* agt. *Totten* (10 How., 233); *Bank of Geneva* agt. *Gulick* (8 How., 51). In this case the complaint does not show by whom the assignments were obtained, nor is any opportunity afforded to the defendant of ascertaining what the title of the plaintiff is. There must be judgment for the defendant upon the demurrer, with leave to the plaintiff to amend upon the payment of costs.

COUNTY COURT.

EDWARD L. BARTON and IRA F. ACKLEY agt. HENRY SAALFIELD and G. R. GRIFFIN.

Attachment — Code of Civil Procedure, section 636 — Sufficiency of affidavit under this section.

An averment in an affidavit for an attachment made by a plaintiff, "that a cause of action exists in favor of plaintiffs against said defendants for which said action is commenced, and that the amount of plaintiff's claim in said action is \$283.20, and interest from the 15th day of April, 1883, over and above all counter-claims and set-offs known to deponent," is a compliance with the requirement of section 636 of the Code of Civil Procedure, that plaintiff must show by affidavit that he is entitled to recover a sum stated therein, *over and above all counter-claims known to him*, and is sufficient to give the judge jurisdiction to grant the warrant.

Allegany county, January, 1885.

Armstrong & Brown, for motion.

FARNUM, Co. J.—This is an *ex parte* motion made by the defendants under sections 682 and 683 of the Code of Ci

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Procedure, to vacate an attachment granted by me in this action January seventh instant.

The attachment was granted upon a verified complaint and upon an affidavit made by one of the plaintiffs. The complaint set up a cause of action for "breach of contract, express or implied, other than a contract to marry," and it is urged that the affidavit does not show that the plaintiffs are entitled to recover a sum stated, "over and above all counter-claims known to them." The allegations upon this point are: "Deponent further says, that a cause of action exists in favor of said plaintiffs against said defendants for which said action is commenced, and that the amount of plaintiff's claim in said action is \$283.20, and interest from the 15th day of April, 1883, over and above all counter-claims and set-offs known to deponent."

Section 636 of the Code provides that the plaintiff must show by affidavit to the satisfaction of the judge granting the warrant of attachment, "that the plaintiff is entitled to recover a sum stated therein over and above all counter-claims known to him."

Have the plaintiffs done this? The complaint is verified by one of the plaintiffs, and all the allegations are upon knowledge, and if true the plaintiff would be entitled to recover the precise sum stated in the affidavit. The affidavit substantially contains all the allegations of the complaint, and also that an action has been commenced to recover a sum of money only, stating it over and above all counter-claims and set-offs known to deponent.

The complaint shows that the plaintiffs are entitled to recover a certain sum; the affidavit shows they are entitled to recover the same sum over and above all counter-claims and set-offs known to deponent. The affidavit does not use the words of the statute, "that the plaintiff is entitled to recover" a sum stated, but the facts averred show that the plaintiffs are entitled to recover the sum stated. It is not necessary that the affidavit use the exact words of the statute, if it appear

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that the *facts* required to be shown are stated, it is sufficient, and it can make no difference what *language* is used to express the facts (*Ruppert agt. Haug*, 87 *N. Y.*, 144).

In my judgment, the plaintiffs have shown to my satisfaction by legal methods that they are entitled to recover a sum stated over and above all counter-claims known to plaintiffs. The motion must be denied.

N. Y. COMMON PLEAS.

ARTHUR G. SHERMAN and another, appellants, agt. SAMUEL C. BOEHM and another, respondents.

Code of Civil Procedure, section 538 — Answer — What are sham and false denials — When may be stricken out on motion.

A denial in an answer on information and belief of each and every allegation in said complaint constituting the plaintiffs' first alleged cause of action, is subject to a motion under section 538 of the Code of Civil Procedure to strike out as sham where it appears by uncontradicted proof that the defendant must have personal knowledge of the allegations he denies "on information."

If the allegation is untrue because the averments of the complaint are of personal transactions, the remedial provision of section 538, permitting sham defenses to be stricken out on motion, should be applied and the decision in *Wayland agt. Tyson* (45 *N. Y.*,) should not be extended to cover the case. (LARREMORE, J., dissenting.)

General Term, January, 1885.

Before J. F. DALY, ALLEN and LARREMORE, JJ.

APPEAL from order denying plaintiffs' motion to strike out the first defense in the answer of defendants to plaintiffs' first cause of action. Such defense is as follows; "And, further answering on their information and belief, they deny each and every allegation in said complaint constituting the plain

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tiff's first alleged cause of action." The motion was to strike out the defense as sham, or that the answer be made more definite and certain as to what allegations were so denied, and that plaintiffs have such other and further relief as might be just.

The court at special term held that the matter complained of was a part of a defense (it being set forth in the answer, together with other allegations, and not separately numbered); that as part of a defense it could not be stricken out as sham (*Code, sec. 538*), and denied the motion.

Winthrop Parker, for appellants.

Jeroloman & Arrowsmith, opposed.

J. F. DALY, J.—The matter complained of is not part of a defense. Each denial of separate allegations of the complaint is a separate defense and may be stricken out (*Slack agt. Cotton, 2 E. D. S., 400*). It appears from the affidavits on which this motion is made, that the denial in the answer is false because certain of the transactions alleged in the complaint and covered by the denial were personal transactions between plaintiffs and defendants. No affidavits were interposed by the defendants denying this statement. It appears, therefore, that a denial of those personal transactions "on information" is a sham and false denial and should be stricken out.

It is no objection to granting this motion that a general or specific denial cannot be stricken out as sham. The decision in *Wayland agt. Tyson* (45 N. Y., 281) applies to those denials made in the form authorized by section 500 of the Code, viz., absolute denials or denials of information sufficient to constitute a basis of belief. It has been held that a denial "on information and belief" may be made where the defendant has no positive knowledge, and is prepared to assert upon such information as he possesses, that the allegations of the complaint are false (*Brotherton agt. Downey, 21 Hun, 436*).

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Such denials cannot be regarded as frivolous (*Metraz* agt. *Pearsall*, 5 *Abb. N. C.*, 90), nor as irrelevant or redundant (*Brotherton* agt. *Downey*, *supra*). But it has not been held that such a denial is not subject to a motion to strike it out as sham where it appears by uncontradicted proof that the defendant must have personal knowledge of the allegations he denies "on information." It is in effect an allegation in the answer that the only knowledge which defendant possesses is derived from information, and that he has formed a belief from such information that the averments of the complaint are false. If that allegation is untrue because the averments of the complaint are of personal transactions, the remedial provision of section 538 permitting sham defenses to be stricken out on motion should be applied, and the decision in *Wayland* agt. *Tyson* (*supra*) should not be extended to cover the case. The allegations in this complaint which defendants have denied "on information and belief" include personal transactions between the parties, as well as matters which are not necessarily within defendant's knowledge.

The motion should be granted striking out the defense complained of as sham, but with leave to defendants to serve an amended answer on payment of ten dollars costs of motion, ten dollars costs of this appeal and disbursements.

ALLEN, J., concurred.

LARREMORE, J. (*dissenting*).—The order appealed from was an application to strike out as sham part of the defense to an action. This, it seems to me, is not strict practice. There was no allegation that the defendants personally made the contract, and I think that the cases of *Slack* agt. *Cotton* (2 *E. D. S.*, 398), and *Collins* agt. *Coggill* (7 *Robt.*, 81) should be followed upon that point. Moreover, a general denial is made, and the rule of *Wayland* agt. *Tyson* (45 *N. Y.*, 281) should be applied. The order appealed from should be affirmed.

Order reversed.

Pilgrim agt. Donnelly.

SUPREME COURT.

EBER L. PILGRIM agt. PATRICK DONNELLY.

Costs — To be allowed where an appeal is taken from an order denying a motion for a new trial, made at special term, upon a case as well as from the judgment — Code of Civil Procedure, sections 3239, 3251.

Upon a motion for a new trial, made at special term upon a case, the appellant is entitled to costs, twenty dollars before argument, and forty dollars for argument where an appeal is taken from an order denying said motion, as well as from the judgment entered in the action under subdivision 3 of section 3251 of the Code of Civil Procedure. Subdivision 2 of section 3239 does not prevent the allowance of such costs.

Brooklyn Special Term, October, 1884.

MOTION for new taxation of costs. On the first trial the defendant had a verdict upon which judgment was entered for costs. The plaintiff appealed to the general term from such judgment, he also made a case containing exceptions upon which a motion was made at special term for a new trial, which was denied, and he appealed from the order denying such motion to said general term. On the appeal the general term reversed the order and judgment and granted a new trial, costs to abide the event. In the special term order denying a new trial nothing was said about costs.

On the second trial plaintiff recovered, and included in his bill of costs twenty dollars before argument, and forty dollars for argument on the appeal at general term, and also like sums before and for argument on the motion for a new trial at special term. The latter items (twenty dollars and forty dollars), the clerk, on motion of defendant, struck out, and the plaintiff made this motion for a new taxation.

Groo & Wiggins, for the motion, claimed that under subdivision 3 of section 3251 of the Code of Civil Procedure, viz: "Upon a motion for a new trial upon a case the same sums as upon an appeal as prescribed in subdivision 4 of this

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section," the plaintiff was entitled to the same costs as on the appeal from the judgment (being sixty dollars at special term and sixty dollars at general term), and cited *Soudder* agt. *Gori* (28 *How.*, 155); *Selover* agt. *Wisner* (37 *How.*, 176); *Stitt* agt. *Rowley* (37 *How.*, 179).

George W. Greene, for defendant, contended that to allow the sums claimed was in effect to give double costs, being sixty dollars on appeal from the order, and sixty dollars on appeal from the judgment. Also that subdivision 2 of section 3239 of the Code of Civil Procedure expressly prohibited the allowance of costs on appeal from the order refusing a new trial, where an appeal is also taken from the judgment.

BARNARD, J.—Motion for a new trial *upon a case* is to be heard as upon appeal. When the motion was denied the defendant was entitled to twenty dollars and forty dollars.

The general term reversed the order, with costs to abide event. When the plaintiff recovered he was entitled to the said sums, twenty dollars and forty dollars.

Ordered accordingly.

SUPREME COURT.

JOHN D. MCKINLAY and others agt. ANDERSON FOWLER
and others.

Attachment — What constitutes residence for the purposes of — Code of Civil Procedure, section 636.

The presumption is that a man resides where his family and house are. One having his domicile in this state may, by absence therefrom to another state, become a non-resident within section 636 of the Code relating to attachments.

A firm as such cannot be said to have a residence. It is the individual members who have residences (*Reversing S. C.*, 67 *How.*, 388).

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Third Department, General Term, January, 1885.

Before LEARNED, P. J., BOCKES and LANDON, JJ.

APPEAL from an order of the special term refusing to vacate an attachment (*Reported below*, 67 *How. Pr.*, 388).

The defendants, five in number, were a firm doing business in Chicago, Ill. An attachment issued against the defendants as non-residents. The defendant Anderson Fowler on his own behalf moved to vacate the attachment on two grounds:

First. That the property seized by the sheriff was not the property of the defendants, but of Frank Clifton & Co., of which concern the defendant Anderson Fowler was one.

Second. That the defendant Anderson Fowler was a resident of the state.

The motion was denied and he appealed to this court. Other facts are stated in the opinion.

Simon W. Rosendale, for appellant:

I. The attachment against the interest of Anderson Fowler in the property attached is valid until set aside (*Smith agt. Oser*, 42 *N. Y.*, 132; *Staats agt. Buston*, 73 *N. Y.*, 264). One defendant copartner can move to vacate (*Code, sec. 682*).

II. The defendant, Anderson Fowler, was not a non-resident of this state (*Wallace agt. Castle*, 68 *N. Y.*, 370; *Chaine agt. Wilson*, 1 *Bosw.*, 673, 685; *Murphy agt. Baldwin*, 41 *How.*, 270; *Wade agt. Matheson*, 4 *Lans.*, 158, 161). The plaintiff did not know the facts stated in his affidavit, consequently there could be no preponderance of evidence (*O'Reilly agt. Freel*, 37 *How.*, 272).

III. The cases of *Thompson* (1 *Wend.*, 43), *Frost agt. Bustin* (19 *Wend.*, 11), and *Haggart agt. Morgan* (5 *N. Y.*, 422), present a different state of facts than there is in this case (*See Mayor agt. Genet*, 4 *Hun.*, 487; 63 *N. Y.*, 646). *Foster agt. Newland* (21 *Wend.*, 94) is no precedent for holding that the defendant cannot show where his residence was. He was not estopped.

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Edward J. Meegan, for respondent :

I. The attachment was properly granted (*Code*, secs. 635, 636).
(a.) An attachment is not the commencement of an action, but merely an auxiliary, and papers should not be judged with the same strictness as if sole ground of jurisdiction (*Lumkin* agt. *Douglass*, 27 *Hun*, 517; *Furman* agt. *Walter*, 13 *How. Pr.*, 348). (b.) The court will not pass on the merits of the action on motion to vacate an attachment (*Iselin* agt. *Port Royal R. R. Co.*, 6 *Weekly Dig.*, 130.) (c.) On motion to vacate an attachment, if affidavits are used by the moving party, the plaintiffs may sustain the attachment by new and additional affidavits on any ground recited in the warrant of attachment (*Code of Civil Pro.*, sec. 683; *Godfrey* agt. *Godfrey*, 75 *N. Y.*, 434; *N. Y. and Erie Bank* agt. *Codd*, 11 *How. Pr.*, 221; *Rowles* agt. *Hoare*, 61 *Barb.*, 266).

II. Whether or not the title to the goods attached be in the defendants, the point was not available to the defendant *Anderson Fowler* on the motion to vacate, nor is it on this appeal. (a.) Where a dispute occurs as to the title of goods attached, a defendant claiming that some one else, and not himself, is the owner, and the plaintiff averring title in the defendant, the court should not try and determine the question summarily on affidavits. The plaintiffs should be permitted to have a jury pass on it. The party whose goods are wrongfully taken has always an ample and efficient remedy at law. (b.) The rule is as old as attachment practice itself, "that the allegation that the defendant in an attachment proceeding was not the owner of the property attached is not good matter for a plea in abatement of the suit" (*King* agt. *Bucks*, 11 *Alabama*, 217; *Sims* agt. *Jacobson*, 51 *id.*, 186). (c.) The Code anticipated cases like the present and pointed out the procedure as follows: "Sec. 657. If goods or effects other than a vessel, attached as the property of the defendant are claimed by or in behalf of another person, as his property, the sheriff may, in his discretion, impanel a jury to try the

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validity of the claim." "Sec. 658. If, by their inquisition, the jury find the property of the goods or effects to have been in the claimant at the time of the levy, the sheriff must forthwith deliver them to him or his agent, unless the plaintiff gives an undertaking, with sufficient sureties, to indemnify the sheriff for the detention thereof. If the undertaking is given, the sheriff must detain the goods or effects as the property of the defendant." "Sec. 659. If the property is found to be in the defendant, the finding does not prejudice the right of the claimant to bring an action to recover the goods or effects or the value thereof." (d.) The foregoing provisions of the Code are copied substantially from the Revised Statutes (2 *Edm. Stat.*, secs. 10, 11 and 12, p. 5; *Laws of 1841, chap. 297*). (e.) In *Batcheller agt. Schuyler* (3 *Hill*, 386), arising under the Revised Statutes, it was held that where goods seized on an attachment against an absconding debtor by a third person, the finding of a jury summoned to try the validity of the claim is not conclusive upon the parties, and hence the sheriff may refuse to deliver the goods to the claimant, though the finding be in his favor, and no bond of indemnity be tendered by the attaching creditor; the only consequence of such refusal is, that the sheriff assumes the burthen of showing, in an action against him by the claimant, that the goods are the property of the debtor. (f.) One claiming title to property sold under an attachment against another, has no claim or right to the proceeds in the hands of the sheriff, but the same must be applied upon the attachment (*Rodrigues agt. Treimo*, 54 *Tex.*, 198). (g.) If a defendant conceal property to which he has no title, he cannot, to defeat an attachment obtained by reason of such concealing, show ownership of that property in a third person (*Treadwell agt. Lawlor*, 15 *How. Pr.*, 8).

III. The Code authorizes an attachment against non-residents (Sec. 636). There is, however, a broad and clear distinction in the law between a residence and a domicile, so that although the actual domicile of Anderson Fowler may have

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been in the city of New York, yet he must, under the facts in this case, for attachment purposes, be deemed a non-resident of the state (*Matter of Thompson*, 1 Wend., 44). (a.) An examination of the authorities is invited. Chief Judge SAVAGE says: "The question I think is, where was his actual residence, not his domicile" 1 Wend., *supra*! A person having his domicile here, who carries on business out of this state and personally superintends the same, is not a resident of the state. The domicile of a party may be in one state and his actual residence in another (*Frost agt. Brisbane*, 19 Wend., 11). The court of appeals formulates the doctrine thus: "A person may be a non-resident of the state, within the meaning of the statute relative to non-resident debtors, while his domicile continues within the state. Actual non-residence, without regard to the domicile of the debtor, is what is contemplated by the statute" (*Haggart agt. Morgan*, 5 N. Y., 422; *Towner agt. Church*, 2 Abb., 299; *Burrill agt. Jewett*, 2 Rob., 701; *Hurlburt agt. Seeley*, 11 How. Pr., 512, *ROOSEVELT, J.*; *Dupuy agt. Pemberton*, 53 N. Y., 561 *et seq.*). These cases are not in conflict, but harmonize with a class of cases which hold that one having a fixed domicile in another state, but doing business in this state, dwelling part of the time here, is not a resident within the meaning of our attachment laws (*Murphy agt. Baldwin*, 11 Abb. [N. S.], 407; *S. C.*, 41 How. Pr., 270, and cases cited; *Barry agt. Bockover*, 6 Abb., 374; *Greaton agt. Morgan*, 8 Abb., 64; *Bache agt. Laurence*, 17 How. Pr., 554; *Houghton agt. Ault*, 16 How. Pr., 77; *Perrine agt. Evans*, 35 N. J. L., 221; *Stout agt. Leonard*, 37 N. J. L., 495; *Baldwin agt. Flagg*, 43 N. J. L., 495). In the first class of cases it would be inadmissible to have a person domiciled here evade his creditors by leaving the state even temporarily, and in the second class the debtor owes no allegiance to the state, and our creditors could only get full protection by holding him to be a non-resident (*Kneeland on Att.*, sec. 189).

IV. Within the foregoing cases the attachment can be su

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tained against Anderson Fowler. (a.) The domicile and residence of the firm of Fowler Brothers was in Chicago, Ill. All the partners were there transacting the business of the firm, Anderson Fowler at least part of the time. The cause of action herein was a joint liability against the firm. The remedy against the firm should depend upon where it and the major part of its members dwelt, and where all met to consult, transact and forward the business. It is no hardship to apply to a foreign firm, in reference to its own dealings, a rule recognizing its existence out of the state. Why cannot a firm acquire a legal residence as well as a corporation or an individual; and when non-resident, what injustice is there in charging all the partners who are enjoying the profits of the combination with the consequence of non-residence?

(b.) To illustrate, in the case of railroad corporations: Each county through which a railroad passes is considered its place of residence for the purposes of venue (*Pond agt. H. R. R. Co.*, 17 *How. Pr.*, 543); for highway labor (*The People agt. H. R. R. Co.*, 31 *Barb.*, 138); for taxation (*The People agt. Fredericks*, 48 *Barb.*, 173; 48 *N. Y.*, 70), and as to the jurisdiction of justices' courts (*Belden agt. N. Y. and H. R. R. Co.*, 15 *How. Pr.*, 17; *Sherwood agt. The S. and W. R. R. Co.*, 15 *Barb.*, 650). (c.) Take the case of joint debtors sued in a local city court, process being served only on one defendant, judgment may be taken against all as joint debtors, although some of them reside beyond the jurisdiction of the court (*Hoag agt. Lamont*, 60 *N. Y.*, 96). (d.) The existence and liabilities of a foreign copartnership, depend on the law of the country in which it is formed and exists. (*Whart. Conf. of Laws* [2d ed.], sec. 470; *King agt. Sarria*, 69 *N. Y.*, 25, 32). (e.) If three partners (two of whom reside abroad and one in England) be sued for a partnership debt, and the partner resident in England appear to the action, but refuse to appear for the partners resident abroad, the sheriff, under a *distringas* against the two partners, may take partnership effects, though paid for by the partner resident in

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England alone, to whom the partnership was largely indebted, and the court will not relieve him against such distress (*Morley agt. Stromborn*, 3 *Bos. & Pul.*, 254). (f.) The defendant Anderson Fowler was, in fact, a non-resident of the state when the attachment issued herein. He had not been in the state for some months prior thereto, as all the evidence in the case shows. He told Henry James he was a resident of Chicago, Ill. His affidavit in this case was made and verified in Chicago. He was in Chicago during the month of March. He could not have been served in this state with process during 1884, anterior to March twenty-sixth. In his affidavit he does not make the situation clear, as was his duty if he meant to conceal nothing. He fails to state the time or times when he was within this state, courting and enjoying the sunshine of his domicile; he contents himself with the general statement that he was "generally and commonly to be found in the said city of New York." It was his duty to be specific as to details, as the facts were peculiarly within his own knowledge, in order to overcome the positive and direct testimony on the part of the plaintiffs. Besides he was confronted with an affidavit that he could not be found within the state, and that during the month of March he was seen by, and conversed with, parties in Chicago, Ill. He maintains, however, an ominous and suspicious silence as to details. (g.) The defendant, Anderson Fowler, can gain nothing by having the attachment vacated as to himself. The attachment must stand as against the other four partners, and under it the sheriff rightfully took possession of the property and lawfully holds it, and when execution issues in this action may sell it and deliver it to purchaser at sale (*Marshall agt. McGregor*, 59 *Barb.*, 519; *Smith agt. Orser*, 42 *N. Y.*, 132). If one of two copartners is a non-resident, this is held sufficient to authorize an attachment against him, leviable upon his interest in the partnership property (*McHenry agt. Cathorne*, 5 *Heisk. [Tenn.]*, 508). So, if one partner should fraudulently transfer his property, even to his copart-

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(*Hirsch* agt. *Hutchinson*, 64 *How. Pr.*, 366; *S. C.*, 3 *Civil Pro. Rep.*, 106). Section 693 of the Code provides: "If a warrant of attachment is levied upon the interest of one or more partners, in goods or chattels of a partnership, the other partners, who are not defendants in the action, or any of them, may at any time before final judgment apply * * * for an order to discharge the attachment as to that interest."

LEARNED, *P. J.*—The simple question is, whether Anderson Fowler at the time of issuing the attachment was "not a resident of the state" (*Code*, *sec.* 636, *sub.* 2).

The affidavit of Henry Davis states that Fowler has been openly and continuously a resident of the city of New York; that his residence was No. 60 East Sixty-eighth street; that he is generally and commonly to be found in that city; that the city directories of New York and of Chicago give his residence as of New York; that his family have resided there for many years past. Fowler's own affidavit is to the same effect, so are the affidavits of Clifton and of Page.

On the part of the plaintiff there is the affidavit on which the attachment was obtained, that neither of defendants reside in the state of New York, but in Chicago. There is further affidavit of plaintiff that the firm of Fowler Brothers has a fixed residence and domicile in Chicago, and that such is the understanding of the trade; that bill-heads of the firm are headed Chicago, and letters dated there, &c.

An affidavit of James that defendants stated that they resided in Chicago, and that he cannot be mistaken, that this statement was made by Anderson Fowler. A further affidavit of plaintiff that defendants' names appear in the directory of Chicago, and that they cannot be found in this state, and that they were then in Chicago.

There is no doubt for certain purposes, for instance for sequestration, a distinction between domicile and residence (*Dupuy* agt. *Pemberton*, 53 *N. Y.*, 556). One may go abroad and reside abroad for instance, with no intention of changing

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his domicile, and he may thus retain his domicile in this country while residing in another. But that distinction can hardly be said to arise here.

The evidence shows that Fowler's domicile and residence were in New York city. There he had his house and there were his family. Absences on business to Chicago, though frequent, would not necessarily make him a resident of Chicago. It is undoubtedly true that he might make such a stay in Chicago as would constitute residence there, though his domicile were here (*Haggart agt. Morgan*, 1 *Seld.*, 422). This is seen in *Towner agt. Church* (2 *Abb.*, 299), where the defendant's family resided in another state and he spent his nights and Sundays there with them, but carried on business in New York, being in that city during business hours. He was held not to be a non-resident.

But in the present case there is an absence of those facts which would show that Fowler's residence was in Chicago. True the firm did their business in that city; but the firm as such cannot be said to have a residence. It is the individual members who have residences; and unless it be shown that Fowler did more than take occasional visits to Chicago, we have no facts which shake the presumption that he resides where his family and his house are.

We think that the weight of the evidence shows unquestionably that Fowler was a resident of this state.

Order reversed, with ten dollars costs, and printing, disbursements and attachment vacated as to Anderson Fowler, with ten dollars costs.

Matter of the Petition of Phillips agt. Phillips.

SUPREME COURT.

In the Matter of the petition to revoke the probate of the will of LEWIS S. PHILLIPS, deceased, by ERASTUS B. PHILLIPS and MARY J. LYMAN, petitioners and appellants, agt. MARY B. PHILLIPS, as executrix, &c., respondent.

Will—What is a valid execution as prescribed by statute.

A subscription without a seal is a valid execution of a will relating to real and personal estate.

The testator's acknowledgment, in the presence of the attesting witness, that the instrument presented for attestation was his last will and testament, connected with the fact that his signature had then been made was then seen by each attesting witness, each knowing his handwriting, was a sufficient acknowledgment of the genuineness of the signature and a perfect identification thereof.

It is unnecessary that the acknowledgment be made in the presence of both of the attesting witnesses at the same time, but it is sufficient to make it to them severally. It is also unnecessary for the attesting witnesses to sign in the presence of each other.

Where a testator declared to his subscribing witnesses severally that the instrument by him previously subscribed was his last will and testament; it was a sufficient acknowledgment. The subscribing witnesses having each seen the testator's subscription at the end of the will before the instrument was declared, and knowing his handwriting, it was a perfect identification of the written words.

The attestation clause, usually signed by the attesting witnesses, is no part of the will, and it is legally executed without the addition of such a clause if the witnesses attest in the manner and form prescribed by the statute.

Where the acknowledgment by the testator of his signature and the attesting by the subscribing witness were simultaneous acts, it satisfies the reason of the statute, and is a sufficient compliance therewith.

Fourth Department, General Term, October, 1884.

Before HARDIN, P. J., FOLLETT and MERWIN, JJ.

JANUARY 9, 1883, Lewis S. Phillips died leaving a paper purporting to be his last will and testament, of which the following is a copy:

"To whom it may concern:

"Considering the uncertainty of life, I hereby make my last will, by which I give and bequeath all my property and

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effects, both personal and real, to my wife Mary Bigelow Phillips, and I hereby appoint her executrix of this my will.

"If she finds it always convenient to pay my sister Caroline Buck the sum of three hundred (300) dollars a year during her life, and also to give my brother Edwin U. during his life the interest on ten thousand dollars (or seven hundred dollars per year), I wish it to be done.

"Dated this 26th day of February, 1879.

"LEWIS S. PHILLIPS.

"JAMES A. SKINNER,	} Witnesses."
"WILLIAM A. BEACH,	
"JOHN B. STRAUB,	

(In pencil)  "J. B. Straub" is clerk in our store.

(Indorsed on back in pencil) "My will."

The decedent left a personal estate of the value of \$100,000, and left him surviving Mary B. Phillips, widow; Erastus B. Phillips, brother; Edwin W. Phillips, brother; Mary J. Lyman, sister; Caroline Buck, sister; and Stella Phillips, niece, the only child of a deceased brother; who are the heirs and only heirs-at-law and next of kin of the decedent, all of whom are of full age.

February 21, 1883, the will was admitted to probate by the surrogate of the county of Onondaga as a will of real and personal property, and letters testamentary issued thereon to Mary B. Phillips. August 14, 1883, Erastus B. Phillips and Mary J. Lyman presented to the surrogate's court a petition, pursuant to section 2647 of the Code of Civil Procedure, praying that the probate of the will be revoked upon the grounds: (1.) That it was not executed as prescribed by the statutes. (2.) That it was not his free act and deed, but was procured to be made by circumvention and undue influence.

Citations were issued as prescribed by the Code, and the matter was heard before the surrogate. Upon the hearing the second ground alleged, as a reason for revoking the probate, was abandoned. The surrogate made a decision confirming the probate, from which this appeal is brought.

Matter of the Petition of Phillips agt. Phillips.

Frederick A. Lyman, counsel for appellant.

Isaac D. Garfield, counsel for respondent.

FOLLETT, J.—(2 R. S., 63, sec. 40.) "Every last will and testament of real or personal property, or both, shall be executed and attested in the following manner :

"*First.* It shall be subscribed by the testator at the end of the will.

"*Second.* Such subscription shall be made by the testator, in the presence of each of the attesting witnesses, or shall be acknowledged by him to have been so made to each of the attesting witnesses.

"*Third.* The testator at the time of making such subscription, or at the time of acknowledging the same, shall declare the instrument so subscribed to be his last will and testament.

"*Fourth.* There shall be at least two attesting witnesses, each of whom shall sign his name as a witness at the end of the will, at the request of the testator."

The first requirement of the statute was accurately complied with. That it was subscribed at the end of the will is apparent by inspection. That the subscription was made by the testator is undisputed. The will is in the testator's handwriting, so are the words "J. B. Straub is clerk in our store," written in pencil on the page with and below the will ; so, also, are the words "my will" indorsed in pencil on the back of the will. A subscription without a seal is a valid execution of a will relating to real and personal estate (*Matter of Diez*, 50 N. Y., 88 ; and the statute above quoted). The compliance with the requirement is found as a fact by the surrogate and is undisputed.

Was the second subdivision of the section complied with ? The subscription was not made by the testator in the presence of either Skinner or Beach, and it is unknown whether it was made in the presence of Straub. When the will was presented to Skinner and Beach for their attestation it had

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been subscribed by the testator. The signature was acknowledged by the testator to have been made by him to Skinner and Beach. That it was so acknowledged to Skinner is undisputed. Skinner testified, "he acknowledged that was his signature, or acknowledged the execution of the will." Beach testified that the testator told him: "While I was writing my name he told me it was his last will and testament, and that he wanted me to sign my name as a witness." Both Skinner and Beach were well acquainted with the testator's signature and saw it immediately before and at the very time they severally attested the will. After Beach had signed, and in the same interview, the testator made use of the expressions, "that he had executed it," "that he had signed it."

The testator's acknowledgment that the instrument presented for attestation was his last will and testament, connected with the fact that his signature had then been made, was then seen by each attesting witness, each knowing his handwriting, was a sufficient acknowledgment of the genuineness of the signature and a perfect identification thereof (*Higgin's Will*, 94 N. Y., 554; *Baskin agt. Baskin*, 36 N. Y., 416; *Mitchell agt. Mitchell*, 16 Hun, 99; *affirmed* 77 N. Y., 596).

It is unnecessary that the acknowledgment be made in the presence of both of the attesting witnesses at the same time, but it is sufficient to make it to them severally (*Sub. 2 of sec. 40, above quoted*; *Horradt agt. Kingman*, 22 N. Y., 372). It is also unnecessary for the attesting witnesses to sign in the presence of each other (see authorities last cited). The compliance with this requirement is found as fact by the surrogate and is amply sustained by the evidence.

Was the third subdivision of the section complied with? The testator did not, at the time he made his subscription, declare the instrument so subscribed to be his last will and testament, because, as before stated, neither Skinner or Beach was then present; but the testator declared to Skinner and Beach severally that the instrument by him previously sub-

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scribed was his last will and testament. That was a sufficient acknowledgment (*Willis* agt. *Mott*, 36 *N. Y.*, 486, and *authorities before cited*). Skinner and Beach having each seen the testator's subscription at the end of the will before the instrument was declared, and knowing his handwriting, it was a perfect identification of the written words within *Mitchell* agt. *Mitchell* (16 *Hun*, 97; *affirmed* 77 *N. Y.*, 596). The surrogate found as a fact upon this evidence, which is sufficient, that this subdivision had been complied with.

Was the fourth subdivision of the section complied with? The attestation clause usually signed by the attesting witnesses is no part of the will, and it is legally executed without the addition of such a clause if the witnesses attest in the manner and form prescribed by the statute (*Jackson* agt. *Jackson*, 39 *N. Y.*, 153).

The appellants insist that this clause has not been complied with within *Jackson* agt. *Jackson* (39 *N. Y.*, 153); *The Sisters of Charity, &c.*, agt. *Kelley* (67 *N. Y.*, 409); *Rugg* agt. *Rugg* (21 *Hun*, 383; *affirmed*, 83 *N. Y.*, 592); *Charlton* agt. *Hardmarsh* (1 *Sw. & Tr.*, 433; 5 *Jur.* [*N. S.*], 581; *affirmed*, 8 *H. L. Ca.*, 160). The first two cases cited hold that the witnesses must sign, after the testator has subscribed, otherwise it is not a valid execution. The third case recognizes the same rule. The last case holds that if the attesting witnesses do not see the testator perform the manual act of subscription, his acknowledgment of its genuineness and declaration of the purpose for which made, must precede their manual act of signing as attesting witnesses.

Skinner swears that the testator acknowledged his signature before he signed as an attesting witness. Beach swears that the testator had subscribed the will before it was presented to him as before stated. The testator then laid the instrument before Beach and told him he had a paper he wished him to sign as a witness. The witness says: "I commenced writing my name; while I was writing my name he told me it was his last will and testament and that he wanted me to sign my name

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as a witness. I stopped then and told him that I thought the paper was informally drawn." The testator and the witness had further conversation in which the testator made use of the expression "that he had executed it; that he had signed it." Q. When did you finish your signature? A. After he had finished talking. Q. After he had told you what it was? A. Yes, sir. Q. Was his name signed at the time? A. It was. Q. Now, Mr. Beach, was it not after you had signed your name that he first told you that it was a will? A. No; it was as I took the pen; I was already writing and he put the paper, as he took it out of his pocket, on the table in front of me, and he said there was the paper he wanted I should sign; I put the papers on which I was to work on one side and commenced the signature, and he told me then."

The construction most favorable to the appellants of the evidence of Beach, is, that the acknowledgment by the testator of his signature, and the attesting by Beach were simultaneous acts. This has never been held insufficient, and we think it satisfies the reason of the statute, and is a sufficient compliance therewith. Upon the compliance with this subdivision of the statute, the surrogate found against the appellants. There is no doubt from the evidence that each of the attesting witnesses attested fully, intending to become an attesting witness to the will. The fact that Beach told the testator that the execution was informal, and that Beach entertained the idea that the testator would thereafter execute a will in a more formal manner, did not change the character of the completed act. That the testator did intend that that instrument should be his will, is plainly disclosed by his persistent defense to Beach of the sufficiency of its execution and by his retaining it as his will. The point is made that, by section 2652, Code Civil Procedure, the surrogate is required to make a decree, revoking or confirming the probate; that the decision of the surrogate is not a decree, and that the appeal is prematurely taken.

Near the close of the decision, this paragraph occurs: "And

In the Estate of James G. Henry, deceased.

it is further ordered, adjudged and decreed that said last will and testament of said Lewis S. Phillips, deceased, and the probate thereof heretofore made and the decree entered thereon in this court on the 21st day of February, 1883, be and the same hereby are in all respects ratified and confirmed." The decision bears date October 10, 1883, and is signed by the surrogate. The case does not show that the decision or decree has been entered of record, but it must be presumed that the surrogate did his duty. The appeal was not prematurely taken and cannot be dismissed.

The decree of the surrogate is affirmed, with costs.

HARDIN, P. J., and MERWIN, J., concur.

NOTE. — Affirmed by court of appeals, March 8, 1885.—[Ed.]

SURROGATE'S COURT.

In the Estate of JAMES G. HENRY, deceased.

Practice — Power of the surrogate to strike out allegations contained in a petition for the revocation of probate of a will as irrelevant, redundant and scandalous — Code of Civil Procedure, section 2533.

A surrogate has power, on motion, to strike out allegations contained in a petition for the revocation of probate of a will, as irrelevant and redundant.

Where the averments, which the moving party seeks to eliminate from the petition concern circumstances and occurrences, that must rather be regarded as matters of evidence bearing upon the issues to be tried than as necessary allegations making or attending such issues, they will be stricken out.

New York county, February, 1885.

MOTION to strike out allegations contained in a petition for the revocation of probate of a will as irrelevant, redundant and scandalous.

Charles G. Cronin, for motion.

Francis N. Bangs, opposed.

In the Estate of James G. Henry, deceased.

ROLLINS, J.—Section 2533 of the Code of Civil Procedure declares that “the surrogate may at any time require a party to file a written petition or answer, containing a plain and concise statement of the facts constituting his claim, objection or defense, and a demand of the decree, order or other relief to which he supposes himself to be entitled.”

The fourth rule of this court establishes the procedure for initiating the contest over the probate of a will, and requires that the contestant shall file a verified answer containing a *concise* statement of the grounds of his objections to probate, and of any facts that he may allege tending to show a lack of jurisdiction in the surrogate's court. I see no reason why a petition for *revoking* probate should in this respect differ essentially from an answer to a petition *granting* probate. There are obviously many cases in which the surrogate, in the just exercise of the discretionary authority conferred upon him by section 2533, would not only permit, but would feel bound to require a petitioner or objector to make a full and detailed statement of the facts and circumstances upon which his claim or defense might depend. But, in general, a probate proceeding is of such a character that its issues may be clearly and distinctly presented, without resort to any such particularity of detail as appears in the petition for revocation which is here attacked.

The averments that the moving party seeks to eliminate from the petition concern circumstances and occurrences that must rather be regarded as matters of evidence bearing upon the issues to be tried than as necessary allegations making or attending such issues.

The whole case is presented in sufficient detail by such portions of the petition as have not been objected to.

The remaining portions must, therefore, be stricken out, but with the exceptions following:

The clause beginning with the words “that in the summer of 1880,” and ending with the word “Simmons,” may remain, and so, too, may the clause commencing with the

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words "that your petitioner," and ending with the words and figures "the 28th day of September, 1883."

Let an order be entered accordingly.

SUPREME COURT.

CHRISTOPHER MEYER agt. THOMAS S. BLAIR and THOMAS
STEUTHERS.

Guaranty — When a secret collateral guaranty illegal and cannot be enforced.

The defendants, representing a corporation, recited in their prospectus that its whole capital stock had been issued to them in payment for certain property, and that they had made an agreement to place 9,000 shares of the stock in the hands of a trustee who had ordered the sale of 6,000 shares, which were offered at the minimum price of fifty dollars per share. The plaintiff, who subscribed for 600 shares, received a collateral guaranty from defendants that they would, at a future time, in case he was dissatisfied with his purchase, take the same off his hands. In this action to recover back the moneys paid upon the subscription:

Held, that each subscriber to a portion of the 6,000 shares had a right to require that each one of his co-subscribers should be a reliable subscriber, that is, an absolute subscriber, not possessing such a collateral agreement as that given to plaintiffs; and that the agreement in question not having been disclosed to all the parties subscribing for the stock, was illegal and cannot be enforced.

New York Circuit, September, 1884.

William H. Williams and A. R. Dyett, for plaintiff.

Elial F. Hall and Stephen P. Nash, for defendants.

LAWRENCE, J. — I am of the opinion, upon the evidence, that the agreement of April 4, 1873, must be regarded as having been entered into in consideration of and as part of the agreement of the plaintiff to subscribe for the 600 shares of the capital stock of the Blair Iron and Steel Company, the corporation mentioned and referred to in the pleadings in this

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action. Such being the case, I am further of the opinion that the agreement in question, not having been disclosed to all the parties subscribing for the stock, was illegal and cannot be enforced.

In *Adams agt. Outhouse* (45 N. Y., 318, 322) judge ALLEN, in delivering the opinion of the court, in commenting upon the case of *Bliss agt. Matteson* (45 N. Y., 22), states "that the case is authority for holding that the principles of *Russell agt. Rogers* (10 Wend., 473) and kindred cases apply to all cases within the reason of the rule, and absolutely disables every one acting with others in a matter of common interest from securing to himself any particular profit or advantage over his associates by any secret or undisclosed agreement or understanding" (See, also, *Blodgett agt. Merrill*, 20 Vt., 509.)

In the case of the *White Mountains Railroad Company agt. Eastman* (34 N. H. R., 124) it was held that "a secret agreement entered into between the directors of a railroad corporation and subscriber for shares in its capital stock, that he may within a specified time reduce the number of shares thus subscribed for, the subscription being held out as *bona fide* for the full amount, in order to induce others to become subscribers, is void as a fraud upon the other subscribers, and the original subscription may be enforced for its full amount between the corporation and the subscriber." In that case SAWYER, J., most clearly states the principles which control cases of this description. At page 141 he says :

"It is the secret stipulation alone which operates in fraud of others, and upon that the law leaves the parties where they stand, declining to enforce it for the benefit of either, while, as to the other part of the contract, to enforce it between the parties, is what is necessary to defeat their fraudulent purpose as to other innocent persons. That the proceeding is a fraud upon third persons is clear from the relation in which subscribers for stock in a corporation of this kind stand toward each other. In the subscription of each person, every other subscriber has a direct interest. Their respective subscrip-

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tions are contributions or advancements for a common object. The action of each in his subscription may be supposed to be influenced by that of the others, and every subscription to be based upon the ground that the others are what upon their face they purport to be. The fact that one man has bound himself to place a certain amount of his money upon the risk involved in the enterprise is an inducement to others to venture in like manner. Seeing who are his associates and the extent of the liability which they have assumed, he regulates his own upon that consideration, and though in form and legal effect the contract of each is with the corporation, yet among the subscribers themselves it is to be regarded as an agreement with every other subscriber to bear that proportion of the common burden to which he professes to bind himself by the contract which he holds out to them as his contract with the corporation. * * * The books abound with cases in which the principle is applied that a secret agreement between the parties to a contract, changing its character from what it ostensibly is, to the prejudice of others collaterally interested, is a fraud on them, and therefore void, even as between the parties themselves (*Jackson agt. Duchaire*, 3 T. R., 551; *Wayburd agt. Stanton*, 4 Esp., 179)."

It seems to me that the reasoning in that case demonstrates that the agreement upon which this action was brought was fraudulent as to the other subscribers to the stock in question, and that such agreement was therefore illegal and void. Messrs. Blair and Struthers, who made the agreement with the plaintiff which is the subject of this suit, in the prospectus which precedes the subscription paper, state that "the capital stock of the Blair Iron and Steel Company is 25,000 shares of \$100 each, \$2,500,000. This capital has been paid up by the transfer of the patents for the Blair process and the works at Glenwood, Twenty-third ward of Pittsburg, Pa., to the company (the deed for the Glenwood property to be made as soon as any empowering act can be obtained from the Pennsylvania legislature, which we have bound ourselves to

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procure), and the whole stock of said company, issued to us in payment thereof. We have agreed to place in the hands of General A. S. Diven, as trustee, 9,000 shares of this stock, to be used as working capital for the company, subject to the order of the board of trustees of said company, excepting \$50,000 of the proceeds thereof, first to be paid to us by the said trustee. The trustees of the company have, with our consent, ordered the sale of 6,000 of said shares for the purpose of raising a present working capital and paying said \$50,000, the minimum price to be fifty dollars per share. And said trustee, with the approbation of the board of trustees, now offers said 6,000 shares at said minimum price of fifty dollars per share, to be paid for as follows, viz., one-third part thereof as soon as the whole 6,000 shares shall be subscribed for, and the remainder in such installments as the board of trustees may call for the same for the purpose of the business, the certificates to be delivered when the whole shall be paid." The subscription paper reads as follows:

"We, the undersigned, hereby subscribe to the number of shares set opposite to our names respectively, to be paid for according to the terms above set forth; but this subscription not to be binding until the whole 6,000 shares shall have been reliably subscribed for."

This subscription paper was signed by the plaintiff and by the other parties who subscribed for the said 6,000 shares of the capital stock of the company. I do not think that it can justly be contended that the plaintiff can be considered as having been a reliable subscriber within the meaning of the subscription paper. The evidence shows that some of the other subscribers had an agreement with the defendants in this action, similar to that upon which this action is brought, but it is quite clear that several of the other subscribers did not receive any collateral agreement or guaranty, and that they did not know that such a guaranty had been given to the plaintiff or others (see testimony of Marquand, Dixon and Morris, Jr.). It would therefore appear that the agreement

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in question, in spirit and effect, stands upon the same principles as those which govern in the construction of composition agreements, and that the cases which hold that every agreement or arrangement, when a composition is made with creditors, by which an advantage is secured to any one of the creditors which is withheld from the others, is a fraud upon the creditors from whom it is concealed, although it has never had, nor can have the effect of depriving them of any portion of the amount which they had agreed to receive, must control this case (*See Breck agt. Cole*, 4 *Sandf. Supr. Ct.*, 79; *Pinner agt. Higgins*, 12 *Abb. Pr.* 334; *Lawrence agt. Clark*, 36 *N. Y.*, 128).

It is contended by the counsel for the plaintiff that this case is not analogous to the cases referred to, because the agreement which is the subject of this action is entirely collateral, and was made with an outside party who was only indirectly interested in having the agreement carried out. I cannot adopt that view of the case. Blair and Struthers, in the transaction referred to, represented the company, and they recited in their prospectus that the whole capital stock had been issued to them and to Foster in payment for the Blair process and the works at Glenwood. They made the agreement to place 9,000 shares of the stock in the hands of Mr. Diven, the trustee, and the trustees of the company, with their consent, had ordered the sale of the 6,000 shares in question. It seems to me that Blair and Struthers then should be regarded in the eye of the law as principals in the transaction, and that each subscriber to a portion of the 6,000 shares had a right to require that each one of his co-subscribers should be a reliable subscriber, that is, an absolute subscriber, not possessing a collateral guaranty from the very parties who had consented to place the 6,000 shares upon the market, that they would at a future time, in case such subscriber was dissatisfied with his purchase, take the same off his hands. At all events I think that each subscriber was entitled to know that such a guaranty had been given, and that the concealment of such fact from

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any or all of the subscribers brings the case within the principles laid down by the authorities to which I have referred.

It was said, too, upon the argument, that there was no analogy between the cases of composition deeds and subscription papers, such as that which was signed in this case. The case of the *White Mountain Company* agt. *Eastman* (34 N. H. R., 124) already referred to, and the cases of *Melvin* agt. *Lamar Insurance Company* (80 Ill. R., 446); *Graff* agt. *Pittsburgh Railroad Company* (7 Casey, 489); *Miller* agt. *Hanover Junction Railroad Company* (6 Norris, 95), I think most clearly show that such analogy does exist.

In *Miller* agt. *Hanover Junction, &c., Railroad Company* (6 Norris, 95), the court held that a subscription to joint-stock is not only an undertaking with the company, but with all other subscribers, and that a subscriber cannot be permitted to set up a secret parol arrangement with the agents of the company, by which he may be released from his subscription while his fellow subscribers continue to be bound. In that case the court quoted with approbation from the opinion of *WOODWARD, J.*, in the case of *Graff* agt. *The Pittsburgh Railroad Company* (7 Casey, 489, 498), in which the learned justice says that "subscription to a joint-stock is not only an undertaking to the company, but with all other subscribers; and even if fraudulent as between the parties, is to be enforced for the benefit of the others in interest."

And in *Robinson* agt. *The Pittsburg and Connelville Railroad Company* (8 Casey, 334) the supreme court of Pennsylvania also held that it is no defense to an action to recover the amount of a subscription to the capital stock of a railroad company; that it was made at the request of the members of the company, with the understanding that the defendant was not to pay for or hold the stock subscribed, and that the same was to be canceled; also, that such an agreement would be a fraud on the company and on all subsequent subscribers, and whilst the defendant might reap no advantage from it, he would be held to all the responsibility of a *bona fide* subscriber. On

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the authority of these cases I think that it must be held that the agreement referred to in the complaint was fraudulent and void, and that, while the plaintiff may be liable upon his subscription, he cannot enforce the agreement between him and the defendants (*See, also, to the same effect, Chandler agt. Brown*, 74 Ill., 333; *The Connecticut River, &c., R. R. Co. agt. Baily*, 24 Vt., 495, and *Anderson agt. Newcastle R. R. Co.*, 12 Ind., 376). If I am right in the opinion that the facts disclosed upon the trial render the agreement of April 4, 1873, incapable of enforcement, it is unnecessary to discuss the other questions which have been so elaborately presented by the respective counsel in their briefs.

The complaint should be dismissed, with costs.

CITY COURT OF NEW YORK.

JOHN MCCARRON agt. SYLVESTER CAHILL.

Complaint—Demurrer—When demurrer to complaint will be overruled as frivolous—Code of Civil Procedure, section 587.

A demurrer to a complaint will be overruled when the alleged defect is, at the most, clearly a technical one or a clerical error.

MOTION to overrule demurrer, and for judgment.

A. H. Wagner, attorney for plaintiff.

James H. Whitelegge, attorney for defendant.

HYATT, J. — The complaint alleges "that the plaintiff, at the request of the defendant, performed work, labor and services, and furnished materials for the same of the value of fifty-eight dollars and forty-eight cents, that the items of such labor and materials and days on which the same were done or furnished are hereto annexed." "That no part of the same has been furnished." The defendant demurs upon

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the ground that "the complaint does not contain facts sufficient *upon its face* to constitute a cause of action." An issue of law arising upon a demurrer (*Code of Civil Pro., sec. 974*) must be tried, as prescribed by sections 965 and 977 Code of Civil Procedure, unless it is disposed of by motion under section 537 of that act.

The question before the court is the motion of the plaintiff to overrule the demurrer as frivolous. He cannot be set aside or deprived of priority of hearing thereon, by reason of the fact that after the due service of notice of motion the defendant served a notice of trial of an issue of law arising upon the demurrer. The objection made to the complaint is that it nowhere alleges an indebtedness by defendant to plaintiff by reason of the phraseology of the second allegation "that no part of the same has been *furnished*." It is urged that this nullifies the force of the first allegation or cause of action, that materials *were* furnished, and that if they were not, no work could have been performed as alleged. In the original complaint, the word "paid" supplies the place of the word furnished in the copy. It is written over an erasure, and it is just possible that the word furnished might originally have occupied its place. Admitting, however, that the copy pleading *served* must control (*Lane agt. Salter, 4 Rob., 239*), yet the complaint is not demurrable.

In the construction of a pleading for the purpose of determining its effect, its allegations will be literally construed with a view to substantial justice between the parties. The law will give it effect, if such can consistently be done, rather than treat it as a nullity. The alleged defect is, at the most, a technical one, a clerical error happening most likely in consequence of the impression left in the mind of the clerk or copyist, by reason of having written the same word several times in the same paper, and thus inadvertently repeating it in place of the intended word "paid." There were no ignorant or willful omissions of the facts upon which the pleader's case depended, and the rule is well settled that

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on the question of evidence to support a cause of action or a matter of defense a technical defect in a pleading should be disregarded on the trial (*White* agt. *Spencer*, 14 *N. Y.*, 247; *Simson* agt. *Cowan*, 56 *Barb.*, 395; *Ayers* agt. *O'Farrell*, 10 *Bosw.*, 143). The demurrer is without adequate reason, and in my judgment was interposed in bad faith.

The demurrer must, therefore, be overruled, and judgment ordered for the defendant, with costs and ten dollars cost of motion.

N. Y. COMMON PLEAS.

PATRICK FARLEY, respondent, agt. WILLIAM H. BROWNING,
appellant.

Action — Pleadings — Evidence — Proof required in action on special contract and on quantum meruit.

Indebitatus assumpsit will lie to recover the stipulated price due on a special contract where the contract has been completely executed, so that only a duty to pay the money remains.

It is essential in such an action that the plaintiff should prove that the special contract has been performed on his part, as well as he must also do, if he resorts to an *indebitatus assumpsit*.

Where, therefore, the answer in an action of this character admits that the plaintiff had done work and furnished materials for and at the request of the defendant but denied their value, it is error to refuse to allow the defendant to prove non-performance of the contract.

General Term, January, 1885.

Before DALY, C. J., VAN HOESEN and LARREMORE, JJ.

APPEAL from a judgment of the court and jury.

The complaint alleges a *quantum meruit* and a promise to pay a balance of \$200 claimed to be due. The answer admitted that the plaintiff performed work and furnished materials, but denied their value. The court refused to allow the defendant to show that the work had not been done

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and the materials had not been furnished, and instructed the jury that the question for them to decide was not whether the work was done or not, but whether a promise to pay was made.

J. C. Julius Langbein, for appellant, made and argued the following points:

I. The complaint being brought upon a *quantum meruit*, for which the defendant promised to pay, it was incumbent upon the plaintiff to prove performance, and this the defendant should have been allowed to deny (*Ladue* agt. *Seymour*, 24 *Wend.*, 60; *Trimble* agt. *Stilwell*, 4 *E. D. Smith*, 514; *Flood* agt. *Mitchell*, 68 *N. Y.*, 503; *Farren* agt. *Sherwood*, 17 *N. Y.*, 229; *Moffett* agt. *Sackett*, 18 *N. Y.*, 22; *Husley* agt. *Black*, 28 *N. Y.*, 438.)

II. The answer put in issue the value of the services and materials, and it was therefore incumbent on the plaintiff to prove, 1st. What work and materials he furnished; and 2d. Their value; 3d. The breach of the contract. All of which the defendant should have been allowed to disprove (*Van Dyke* agt. *Maguire*, 57 *N. Y.*, 429).

Edward P. Wilder, for respondent, made and argued the following points:

I. Under the issues raised by the pleadings, plaintiff was not bound to prove performance, or the amount or value of the work and materials (*Stafford Pavement Co.* agt. *Monheimer*, 41 *Supr. Ct.*, 184; *Kelsey* agt. *Western*, 2 *N. Y.*, 500; *McKyring* agt. *Bull*, 16 *N. Y.*, 297; *Hall* agt. *U. S. Reflector Co.*, 30 *Hun*, 375).

VAN HONSEN, *J.*—The error in the charge of the judge was caused by a misconstruction of the pleadings. The answer does not admit that the work for which a special contract had been made had been duly performed, it merely admits that the plaintiff had done work, and furnished materials for, and at the request of the defendant. The judge

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construed, erroneously construed, the answer as making an admission, that the plaintiff had done all the work that the written contract, that was produced in evidence (though it had not been mentioned in the complaint) required him to do. In consequence of this misconstruction of the pleadings, the judge fell into the error of instructing the jury "that the question to be decided is, not whether the work was done or not, but whether a promise was made. If the jury find a promise was made, the plaintiff is entitled to a verdict."

In point of fact the chief question in the case was, has the plaintiff fully performed the work mentioned in the written contract? The plaintiff declared on one of the common counts in *assumpsit*. This he had a right to do provided that he had fully completed the special contract. The rule is that *indebitatus assumpsit* will lie to recover the stipulated price due on a special contract, where the contract has been completely executed, so that only a duty to pay the money remains. It is essential that the plaintiff should prove that the special contract has been performed upon his part (*Jewell* agt. *Schroepfel*, 4 Cow., 566; *Farron* agt. *Sherwood*, 17 N. Y., 227; *Hosely* agt. *Black*, 28 N. Y., 438; *Hurst* agt. *Litchfield*, 39 N. Y., 377; *Higgins* agt. *Newton R. R. Co.*, 66 N. Y., 605.)

The plaintiff undertook to prove performance, and he offered evidence for that purpose. The defendant then offered to prove that the work had never been finished. The court ruled that he could not be allowed to show that the contract had not been performed, but notwithstanding that ruling the defendant was afterwards permitted to give a good deal of testimony to show that the plaintiff had failed to do the work that the contract had provided for. It might perhaps be said that the action of the court in allowing the defendant to prove that the contract had not been performed, obviated the exception taken to the ruling that such proofs could not be admitted, but there is still the exception taken to the instruction to the jury, that it was of no

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consequence whether the contract had been performed or not. This instruction was, as I have said, erroneous, and because of it judgment must be reversed. In his note to *Cuttler* agt. *Powell* (2 *Smith's Leading Cases*), Mr. Wallace says: "Where there has been a special contract, the whole of which has been executed on the part of the plaintiff, and the time of payment on the other side is passed, a suit may be brought on the special contract, or a general assumpsit may be maintained; and in the last case the measure of damages will be the recompense fixed by the special contract. If, however, the special contract be open, and there be no fault or omission on the part of the defendant, *indebitatus assumpsit* will not lie."

The plaintiff cannot free himself from the obligation of proving his case by changing the form of his pleading. If he sues upon the special contract, he must prove performance, and so he must do, if he resorts to an *indebitatus assumpsit*.

The judgment should be reversed, and a new trial ordered, with costs to abide the event.

DALY, Ch. J., and LARREMORE, J., concur.

Judgment reversed.

COURT OF APPEALS.

THOMAS F. HAYES, appellant, agt. ALEXANDER V. DAVIDSON,
respondent.

Sheriff — Indemnitors for — When and when not indemnitor may be substituted in action against sheriff — Code of Civil Procedure, sections 1421 to 1427.

In an action against the sheriff for an alleged trespass in seizing and converting plaintiff's property, it is a fatal objection to an order discharging the sheriff from liability, and substituting in his place as defendants several persons who claim to have indemnified him for his acts, that the moving papers fail to show that the applicants became indemnitors to the sheriff before the commencement of the action.

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The provisions of the Code restricting the remedy of a party to the indemnitors of the sheriff, would seem to contemplate a seizure by that officer of property under a single execution or attachment, and the substitution of indemnitors liable upon a single bond, where the liability of the obligors is necessarily co-extensive with that of the officer whose position as defendant they seek to occupy, and not the substitution of numerous indemnitors liable for distinct and separate levies where each applicant is made joint defendant with numerous applicants, applying by other attorneys, and in separate proceedings, although the individual consents of each of the several indemnitors appearing in the record authorize only an order making the applicant alone a party defendant in the action.

Decided, March, 1885.

Peter Condon, for appellant.

W. Bourke Cockran, for respondent Davidson.

Blumenstiel & Hirsch, for respondents Muser *et al.*

Langbein Bros. & Langbein, for respondents Constable *et al.*

E. S. Hatch, for respondents Waters *et al.*

W. D. Peck, for respondents Pullman *et al.*

REGER, C. J. — This is an appeal from an affirmance by the general term, of an order of the special term, discharging the sheriff from his liability to the plaintiff for an alleged trespass in seizing and converting his property and substituting in his place as defendant several persons who claim to have indemnified the sheriff for his acts in seizing the property. The motion was made under the provisions of the Code of Civil Procedure embraced in the several sections numbered 1421 to 1427 inclusive.

Section 1421 reads as follows: Where an action to recover a chattel hereafter levied upon by virtue of an execution or a warrant of attachment, or to recover damages by reason of a levy upon, detention or sale of personal property hereafter made by virtue of an execution or a warrant of attachment, is

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brought against an officer, or against a person who acted by his command, or in his aid, if a bond or written undertaking, indemnifying the officer against the levy or other act was given in behalf of the judgment creditor, or the plaintiff in the warrant before the action was commenced, the person or persons who gave it, or the survivors, if one or more are dead, may apply to the court for an order to substitute the applicants as defendants in the action in place of the officer or the persons so acting by his command or in his aid.

Section 1422 provides that in case the pleadings do not show that the case is one where the order may be granted, the facts may be otherwise shown, and that the moving papers must contain a written consent, duly executed, acknowledged and certified, on the part of the applicants to be made defendants.

Section 1423 authorizes the court to impose such terms upon granting the order as justice may require.

Section 1424 provides that when the indemnity given by the applicants relates only to a part of the property, that the action may be divided and applicants be admitted to defend as to that part of the action which affects the property in which they are interested.

These provisions of the Code are new and constitute a serious and important innovation upon the law as it stood previous to their enactment. Their constitutionality has been seriously questioned heretofore in this court, and was affirmed by us only after much hesitation and by a divided court.

This statute is clearly in derogation of the common-law and common right, and by settled rules of interpretation must be strictly construed and not extended beyond its express provision and clear import (*McCluskey agt. Crowell*, 11 N. Y., 593; *Sprague agt. Birdsall*, 2 Cow., 419; 4 Mass., 145, 475). If the terms in which it is couched are susceptible of two interpretations, that one must be adopted which conforms most nearly to the rules of the common-law, and encroaches the least upon the individual rights affected by it.

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The propriety of the legislation in question was sought by the codifiers to be made to appear by a reference to the case of *Peck agt. Acker* (20 *Wend.*, 605), where it was held that an officer sued for an official act, has the right to appoint his own attorney and manage the defense, notwithstanding he has been fully indemnified by the party whose process he was executing and such party desires to conduct the defense. When it is considered that such party can easily attain the same advantage in all cases where it is proper that he should be exclusively entitled to defend by inserting a condition to that effect in his bond of indemnity, the reason hardly seems sufficient to justify so radical an encroachment upon the rights of a party whose property has been unlawfully seized (*Preston agt. Yates*, 17 *Hun.*, 92). The act is one of doubtful propriety, and the cases must be rare when any useful purpose can be served by depriving a party of his lawful remedy against the individual who injured him, and compelling him to litigate his demands with persons who were not apparently participants in the wrong out of which his action arose, and as to whose liability and its extent many embarrassing questions may arise.

A wide latitude is conferred by the law upon the court in granting or refusing the substitution provided for by the act, and many cases must arise where, in the exercise of a sound discretion, the substitution applied for should be refused.

We think the case in hand is one of that character. In a case where the property taken consists of numerous articles of large value, and has been seized upon separate and distinct levies under numerous processes at different times, as to some of which indemnity has been given and others not, and where the indemnity refers to different seizures and the penalties of the respective bonds very largely in amount, and some indemnitors apply for substitution and others do not, it seems to us that the invitation to exercise the power granted to the court under the act, in the exercise of a sound discretion might well have been declined.

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We have, however, nothing to do with any discretionary exercise of power by the court below in granting or refusing the relief applied for. It is only where it has made an order, clearly beyond the jurisdiction conferred upon it by the act, that we are entitled to review its action and question the grounds of its proceeding.

The letter of section 1421 would seem to contemplate a seizure by the officer of property under a single execution or attachment, and the substitution of indemnitors liable upon a single bond where the liability of the obligors is necessarily co-extensive with that of the officer whose position as defendant they seek to occupy. In such a case, the rights and remedies of the party claiming ownership of the property are but little interfered with by allowing a substitution, and we have held that the legislature in such case might constitutionally restrict the remedy of a party to the indemnitors of the sheriff, who were the real authors of the alleged wrong. In this case, however, the applicants seek to go still further, and substitute numerous indemnitors liable for distinct and separate levies, and who have not, perhaps, indemnified the sheriff at all for the original seizure of the property upon which he became liable to the plaintiff. Not only this, but the order of the court below makes each applicant a joint defendant, with numerous other applicants applying by other attorneys and in separate proceedings, although the individual consents of each of the several indemnitors appearing in the record, authorize only an order making the applicant alone a party defendant in the action.

The plain reading of the act makes the authority of the court to order such a substitution depend upon the written consent, duly authenticated, of the party applying, and it is quite obvious that the court has no right to make him liable in any other form, or subject to any other conditions than those expressed or implied in his consent.

Without, however, determining the questions referred to, we think a fatal ground of objection to the order exists in

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the omission of the moving papers to show that the applicants became indemnitors to the sheriff before the commencement of this action. Neither the summons, complaint or answer appear in the record, and the motion purports to be made alone upon four certain affidavits and the respective consents of the several indemnitors applying to be substituted as defendants. These affidavits purport to be made by the several attorneys of the various applicants, and contain all of the proof upon which the motion is founded.

Although it appears from them that the seizure of the property sued for was made by the sheriff on the 4th day of January, 1884, and the various indemnity bonds were all executed between the ninth day of January and the thirteenth day of February thereafter, it does not appear when the plaintiff's action was commenced, or that the bonds were executed prior thereto. For aught that appears in this case, the action might have been commenced before any of the bonds were executed or delivered. It is expressly made by the act one of the conditions of the application that the persons applying became indemnitors before the commencement of the action. This fact should appear affirmatively in the moving papers. Not appearing in this case, the court below was not authorized to grant the order appealed from.

The orders of the general and special terms should be reversed and the motion denied, with costs, in all the courts.

All concur.

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NEW YORK CITY COURT.

LYMAN MALLARY agt. FRANK B. ALLEN.

Attachment — Code of Civil Procedure, section 636 — Affidavit by agent of plaintiff — Clause "known to plaintiff" not a jurisdictional prerequisite to the issuing of warrant.

The plaintiff's agent, after setting forth the cause of action, states that "there is now due to said plaintiff from defendant the sum of \$447.95 over and above all offsets and counter-claims known to deponent or to said plaintiff:

Held, that the clause "known to plaintiff," as used in section 636 of the Code of Civil Procedure, is not a jurisdictional prerequisite for the issuing of a warrant of attachment, but must be held to be merely limiting in its character and analogous to the statutes of Michigan, Colorado and other states, which provide that the plaintiff shall set forth the "amount of the indebtedness as near as may be over all counter-claims."

The intent of the legislature in the enactment of section 636 considered. The case of *Oribben agt. Schullinger* (30 Hun, 248) questioned.

General Term, January, 1885.

Before HAWES, HALL and BROWN, JJ.

Daniel C. Briggs, for appellant.

Henry D. Hotchkiss, for respondent.

HAWES, J. — The affidavit in this case is made by Moses R. Crow, who describes himself as the agent and attorney of Lyman Mallary, the plaintiff. From his statement, which is uncontradicted, and upon which the attachment herein was granted, it appears that Bradford, Thomas & Company, of Boston, sold and delivered to defendant certain goods and merchandise, and that there is due from the defendant, on account of such sale, the sum of \$447.95; that the said firm has assigned the claim to the plaintiff, which assignment is in possession of the affiant. Full and unquestioned particulars of the transaction are set forth as within the knowledge of the deponent, and the non-residence of the defendant is admitted.

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It also appears that the plaintiff is absent from the city, and is unable, in the nature of things, to make the affidavit, which is therefore made by the agent, who states "that there is now due to said plaintiff thereon from the said defendant Allen the said sum of four hundred and forty-seven dollars and ninety-five cents over and above all offsets and counter-claims known to deponent or to said plaintiff."

The court below held that this allegation was insufficient under the provision of section 636 of the Code, relying upon the case of *Cribben agt. Schillinger* (30 Hun, 248).

The question here presented is pre-eminently technical; but its determination involves very grave consequences, especially in this city, where, owing to the non-residence of the principals, or their necessary absence, agents are charged with the duty of protecting their interests in all their different aspects, legal and otherwise.

If it is established that the plaintiff must himself make the affidavit, or even be communicated with, before the writ can issue, a large proportion of the business of the courts arising out of this provisional remedy will be eliminated; and the fullest possible discussion of the question would, therefore, seem to be justified.

Now, it is possible that some distinction might be drawn between the case at bar and *Cribben agt. Schillinger*, but I think that it must justly be said that they would be insufficient to take it out of the control of that case, and if it be held that the principle enunciated in *Cribben agt. Schillinger* is to be deemed the law governing this provision of the Code, the order below vacating the attachment must be affirmed.

The ruling in *Cribben agt. Schillinger* has been generally accepted and followed by the courts at special term, and I should deem it presumptuous to question its apparent force but for the fact that it is an interpretation of a statute which is relatively new, and from the further fact that there are *dicta* running through the different decisions touching this question that would in themselves justify me in dissenting

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from the conclusions reached in that case as governing the construction of section 636 of the Code.

Now, it is undoubtedly true that this proceeding is statutory and special and must be strictly pursued, and that the statement of the claim is a material part of the affidavit, as it determines the amount of the defendant's property to be covered by the process and the absence of a proper allegation in that behalf will render the proceedings absolutely void. We are, therefore, led to consider what is actually required by this provision of the Code in order to confer jurisdiction. "To entitle the plaintiff to such a warrant he must show by affidavit to the satisfaction of the judge granting the same * * * that the plaintiff is entitled to recover a sum stated therein over and above all counter-claims known to him." The manifest intention of this provision is to restrict, so far as possible, the amount of the claim, and it is well settled that it is not necessary to use the express language of the statute to establish the fact (*Ruppert agt. Haug*, 87 N. Y., 144). It is only necessary that the judge granting the attachment shall be satisfied by proper legal proof that no counter-claims exist.

If the plaintiff himself makes the affidavit and swears positively that no such counter-claim exists, without adding the words "known to him," it would be manifestly good and not subject to any possible criticism, for he makes oath to its truth in all the wide scope which inference, information or the deepest possible knowledge could suggest. The expression "known to him" was doubtless intended, as is suggested in *Lamkin agt. Douglas* (27 Hun, 518), to be "in relief of the conscience of the affiant," as possibly there might exist some counter-claim of which he was ignorant, but if he is willing to take the chances of such a sweeping affirmation, it does not rest with the defendant to complain, for all and more has been sworn to by him than is required by the statute (*See Alford agt. Cobb*, 28 Hun, 22.)

It will be urged, however, by the respondent that while it may be safely conceded that a statement positively sworn to

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by the plaintiff himself is sufficient to satisfy the statute, yet, in the case of an agent, the principle would not apply, inasmuch as it appears that any knowledge possessed by the plaintiff himself must, in the nature of things, be a matter of information and belief, so far as concerns the agent, and he has not brought himself within the rule laid down in *Steuben County Bank agt. Alberger* (78 N. Y., 252), inasmuch as he has not shown the sources of his information or established the fact that the parties who possessed the information were absent and their deposition could not be obtained. Now, it is clear in the case at bar, and is admitted upon the record, that the agent knew all about the transaction, and knows that no counter-claim exists in so far as this particular matter is concerned; but of course he did not know and could not know what claims might exist in defendant's behalf, in the possible nature of a cross action, having as its basis something wholly disconnected with the plaintiff's business as a merchant and dealer of the goods in question, but which would be none the less a counter-claim under subdivision 2 of section 501 of the Code. The objection would, therefore, go only to the extent of the legal force of the expression "known to plaintiff," and dealing with the question on that basis, we are led to inquire, in the first place, what fact, as such, is there which would justify the court in holding that the proof is not satisfactory. The plaintiff was admittedly absent, and the reason why his affidavit is not furnished is sufficiently shown. What facts within the purview of the decisions affecting this question exist as creating information on the part of the agent, and which it is deemed necessary should be shown to the court as an essential basis of jurisdiction? There is only one fact which by any possibility can be produced in that behalf, and that is a primary fact in itself, and admits of no circumstances or facts as establishing its verity, and the announcement of its existence creates all the proof possible. The mental condition of Mr. Mallary, or rather his inner consciousness, as affecting his knowledge of what the defendant Allen might deem a

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possible cause of action against him, constitutes, so far as I can discover, the only remaining fact which is unknown to the court; but that even is not unknown, for Crow has sworn positively that it does not exist in Mallary's mind, and is there any just reason for the court to hold that Crow is not possessed of that knowledge? There is not only every presumption and likelihood in its favor, but a sworn statement of its truth. But it is claimed that none the less it is on information and the ground of it should be stated, and, admit for the moment that it is so, what evidence of its truth or falsity can be shown? For a party who is making a statement of a fact on information to say that he has received information of that fact, and that that constitutes evidence of the fact, is trifling with every process of logic and common sense; and in saying so it will be borne in mind that I am discussing the truth or falsity of Mallary's knowledge, and it must go to that extent, or the argument of the respondent fails altogether as establishing the fact as a jurisdictional prerequisite, for if it be conceded for a moment that the demonstration of Mallary's knowledge or want of knowledge is not to be essentially shown, its jurisdictional element is gone at once. It is quite clear that no agent can make a satisfactory affidavit in an attachment proceeding, if full force and effect is to be given to the doctrine, for no man can swear to another's knowledge and furnish satisfactory proof of any existing "facts," which would justify the court in determining by any biological or metaphysical research the intellectual *status* of the other person's mind at any one particular moment.

If *Cribben agt. Schillinger* is to be followed in its construction, then proper and legal proof of the knowledge of the plaintiff, or rather his ignorance, must be affirmatively established as a prerequisite to jurisdiction, and the pleader must be held to the strictest proof of a statutory requirement. If, on the other hand, it can be deemed a modification of an absolute affirmation, designed to relieve the conscience of the affiant, then an entirely different rule will prevail. Assuming

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the correctness of the first construction, we are led to consider the character of the knowledge required by this exacting provision. A counter-claim must be one of the two following causes of action: 1. A cause of action arising out of the contract or transaction set forth in the complaint as the foundation of the plaintiff's claim or connected with the subject of the action. 2. In an action on contract, any other cause of action on contract existing at the commencement of the action. If the rule is to be applied as above, it is clear that the pleader must show that the plaintiff has no knowledge of both possible causes of action, and it is equally clear that no agent in the world can make an affidavit covering both causes of action on any recognized principle which governs statutory and jurisdictional requirements. I am well aware that the hardship of a rule of law does not establish its invalidity, but I refer to it now and shall hereafter urge it as tending to determine, in a certain degree, the intent of the legislature in enacting the statute.

It is held in *Smith agt. Arnold* (*Daily Reg.*, Dec. 15, 1884), and in other cases, that an agent can make an affidavit, and it is suggested that possibly the agent, being in sole and absolute charge of the business between the parties, could make it with even greater propriety than the plaintiff himself, but unfortunately all the information in the universe as to those transactions would be but one step in the proof of knowledge, for *non constat*, but that there may still arise a cause of action under subdivision 2 of section 501. It follows, therefore, that satisfactory proof must be produced before the court that principals in Bordeaux or Vienna, for instance, who have, perhaps, never heard the names of these defrauding debtors, are ignorant of any counter-claims. But what proof of such want of knowledge will be "satisfactory." The only possible proof of ignorance of a possible fact requires a mental diagnosis which only the person himself can give. What creates in his mind his opinion as to the non-existence of any such claim, can be known only to him, but the very mental opera-

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tions which produce such a result are processes of ratiocination and intellectual deductions that constitute, in my opinion, the only veritable "facts" that a court could consider as to the truth of one's knowledge or ignorance, and these no agent can give. To say that the court is not satisfied with the statement of an agent because it is on information, and then to say that it is satisfied when the agent says he has been informed and gives no other circumstances as establishing the alleged fact, is reasoning in a circle.

The court, in *Cribben agt. Schillinger*, intimates that it might have been sufficient if the agent had stated in his affidavit that he had been informed by his principal of his want of knowledge. But he had already sworn to it as an absolute fact, which covers, in the very nature of things, all sources of the agent's knowledge, including information, and yet the court insists that from the circumstances of the case it is apparently on information, but would still be satisfied if the agent had stated that it was on information. It is but proper that I should say that the learned court declined to express an opinion as to the effect of such an averment as establishing in itself any additional fact which would tend to confer jurisdiction.

In *Lampkin agt. Douglas* (63 *How.*, 49), the court states that such facts should be stated as will satisfy the court that the plaintiff has no knowledge upon the subject because the entire transaction was with the affiant. But what if it was! A counter-claim might still exist in behalf of defendant, for, although the agent had exclusive knowledge of the whole transaction, yet the fraudulent debtor could dispose of his property without interference, if the principal cannot be reached, or had forgotten to inform the agent of his ignorance, before his departure, and even that would be insufficient in so important a matter as a jurisdictional requirement, for its truthfulness must be shown at the time the application was made and the affidavit sworn to.

Now there cannot, in my opinion, be any shifting or equiv-

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ocal construction of this participial clause. The words "known to plaintiff" must be held to virtually constitute an independent sentence in syntax, and to be an issuable allegation in law, considered by itself and within its strict letter, or else a mere limiting clause, and non-essential in its character so far as affects the question of jurisdiction. The interpretation admits of no compromise as being subject to varying facts or conditions, and the court is bound to accept one or the other of these propositions. It is my opinion that upon any principle of grammatical or legal construction, the expression "known to plaintiff" presumes no such substantive character as is claimed for it. Its participial form is clearly designed to modify the effect of an unqualified affirmation that no possible counter-claim existed, whether made by the plaintiff or his representative. This limiting clause, manifestly inserted for the plaintiff's benefit, has been made to destroy the whole effect of the statute in open defiance of the maxim that an interpretation which gives effect is preferred to one which makes void. This rule could not, of course, be invoked in cases where violence would be done to the construction, but to my mind the interpretation suggested is the only one in harmony with the fairest use of language, viewed in its strict grammatical relation, and it clearly comports with the spirit and purpose of the statute, viewed as a remedial measure.

The provisions as to non-existence of counter-claims exist in the statutes of Michigan, Missouri, Illinois, Oregon, Ohio, South Carolina, Tennessee, Colorado and Idaho, and are substantially like our own, as embodied in section 636 of the Code, as they provide that the plaintiff shall set forth the amount of the indebtedness "after allowing all just credits and set-offs," or "all legal set-offs and counter-claims." In Michigan, Oregon, Tennessee and Colorado the provision is that the plaintiff shall set forth "the amount of the indebtedness, as near as may be, over and above all legal set-offs and counter-claims." The codifier doubtless had in mind the

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qualifying provision contained in the statutes last referred to, and instead of requiring him to state the amount of the indebtedness "as near as may be above any counter-claims," he was required to state the amount of the indebtedness above any counter-claim of which he at that time was cognizant or could remember, and that the one could consistently be deemed tantamount to the other; but if the plaintiff or his agent was willing to swear positively to the fact, it would be clearly sufficient. If such was at all the purpose — and it is clear to my mind that it was — then the intent to make it a substantive and issuable allegation must be abandoned, and the construction above given to it is not only consistent, but is the only one maintainable. The decisions in those states would seem to sustain this construction. The object to be attained by the enactment of section 636 is very manifest, and the intention of the legislature furnishes a just legal basis of interpretation. "It is a sound principle that such a construction ought to be put upon a statute as may best answer the intention which the makers had in view, and that is sometimes to be collected from the cause or necessity of making it; at other times from the circumstances. Whenever the intention can be discovered it ought to be followed with reason and discretion in its construction, although such construction may seem contrary to its letter." When any words are obscure or doubtful, the intention of the legislature is to be resorted to in order to find the meaning of the words. A thing which is within the intention of the makers of a statute is as much within the statute as if it were within the letter of the statute, and a thing which is within the letter of the statute is not within the statute unless it be within the intention of the makers, and such construction ought to be put upon it as does not suffer it to be eluded (*Tonnale agt. Hall*, 4 N. Y., 140). Now in my view of the grammatical structure of the sentence, there is nothing doubtful about the meaning of this limiting clause, and it could safely be treated as surplusage so far as the question of jurisdiction is con-

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cerned, but even if it were otherwise the plain purpose of the statute is to grant an attachment in all cases where the fraud or non-residence is established, and the amount of the plaintiff's claim is honestly, fairly and fully set forth after deducting any indebtedness, set-offs or counter-claims that may reasonably exist or be known, and that will be measured by the business relations existing between the parties which an agent may be conversant with, as well as a principal. To divert the whole question into a discussion of the plaintiff's state of mind, or the ground of his particular knowledge, is to clearly "elude" the statute, to misconstrue the plain purpose of language, and to permit the mischief which the statute was intended to redress.

I have been unable to find any case involving the precise questions here raised, except the case of *Cribben* agt. *Schilling* (*supra*), but they are incidentally touched upon in the following, among the late reported cases: *Smith* agt. *Arnold* (*Daily Reg.*, Dec. 5, 1883); *Murray* agt. *Hankin* (30 *Hun*, 37); *Ruppert* agt. *Haug* (87 *N. Y.*, 141); *Bertram* agt. *Bernhardt* (*Daily Reg.*, Nov. 13, 1884); *Doty* agt. *Atlantic and Gulf Steamer Transportation Company* (*First Dept.*, Jan. Term, 1883); *Bates* agt. *Penisteiri* (*Daily Reg.*, Dec. 26, 1884). In the case of *Ruppert* agt. *Haug*, there was no allegation whatever as to the existence or non-existence of any counter-claim, and was, therefore, manifestly defective. In *Murray* agt. *Hankin* the court stated that if an agent had sworn to the non-existence of the counter-claim to the knowledge of the plaintiff, it would have been sufficient, but this was a *dictum*, and there was no actual ruling upon the question, as it was not involved in the case. In the other cases cited the question was only incidentally referred to, but I feel bound to say that in so far as it is referred to they afford me but little encouragement. I do not deem it necessary to discuss the question of the conclusive character of an affidavit positively sworn to within the ruling of *Ballantey* agt. *Cadot* (3 *Abb.* [*N. S.*], 122; *Evans* agt. *Holmes* (46 *How.*, 517), and

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Michaels agt. Lawrence (30 Mich., 395), and later cases, for in my opinion if full force is to be given to the expression of plaintiff's knowledge when properly construed, the affidavit is sufficient as satisfying the principles applicable to the state of facts here presented, for, as I have already stated, I am of the opinion that the proof of this limiting clause is not essential to confer jurisdiction. The fair and rational construction of this provision, as I comprehend it, is that the court shall be placed in possession of all the facts connected with the transaction by a person who is thoroughly acquainted with it in all its phases, who knows that there are no counter-claims arising out of it, and whose relations to all the parties in interest are such as to fairly justify him in stating on oath that no counter-claim or offsets exist, or can fairly or reasonably arise from any other source, and that this is all that is required under the provision of this section of the Code, and that absolute proof as to the plaintiff's knowledge is not essential to confer jurisdiction upon the court, and I am led to this belief by what I deem to be the strict grammatical force of this limiting clause, as well as by analogous enactments in other states where a similar modifying clause is found, and also by the plain purpose and intent of the legislature in its enactment, which justifies an interpretation that seems to me most reasonable, and in no respect inconsistent with well settled rules of construction.

The order should be reversed, with costs to the appellant, to abide the event.

Matter of the Estate of William R. Welling, deceased.

SURROGATE'S COURT.

In the Matter of the final judicial settlement of the Estate
of WILLIAM R. WELLING, deceased.

*Executors — Commissions — What allowed when there are three executors —
How apportioned — Code of Civil Procedure, section 2786.*

Commissions, at the rates fixed by the statute, are allowed only by an order of the court on the settlement of the executor's account, but the right to such commissions cannot be withheld by the court except in certain cases, as where specific compensation is provided.

Where, on January 14, 1884, letters testamentary were issued to three executors, and on July 15, 1884, one of such executors died, after having acted up to that time, the estate amounting to more than \$100,000:

Held, that on the final accounting, three full commissions should be allowed and apportioned among them, according to the services rendered by each executor.

Orange county, February, 1885.

On January 14, 1884, letters testamentary were issued to Thomas Welling, Sarah Welling and John H. Butts. Butts died July 15, 1884, after having acted up to that time.

On the accounting, it was claimed that three full commissions should be allowed and apportioned, the manner of the apportionment being agreed upon between the two survivors and the executrix of the deceased. The special guardian objected to more than two full commissions being allowed the survivors, and such an amount to the deceased as would be proportionate to the services rendered by him. This estate amounted to nearly \$400,000.

George W. McElroy, for executor Thomas Welling.

H. W. Bookstaver, for executrix Sarah Welling.

L. V. Booraem, for executrix of deceased executor John H. Butts.

M. N. Kane, special guardian of minors' residuary legatees.

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THE SUREGATE.—Commissions at the rate fixed by the statute are allowed only by an order of the court on the settlement of the executor's account (*Redfield on Surrogates* [3d ed.], 725, and cases there cited). The right to such commissions, however, cannot be withheld by the court except in certain cases, as where specific compensation is provided (*Id.*, 720, and cases there cited). The doubt here is occasioned by the death of one of the executors before settlement, and by the fact that the section (sec. 2736) allows each executor the full compensation allowed by law to a sole executor, thereby, possibly, raising the implication that each executor must, at least nominally, participate in the administration until the time of settlement of the estate to entitle him to his full commissions, so that they may be added to the commissions of the others and apportioned among all, as required by the last clause of the section.

SECTION 2736. Where the value of the personal estate of the decedent amounts to one hundred thousand dollars or more over all his debts, each executor or administrator is entitled to the full compensation allowed by law to a sole executor or administrator unless there are more than three, in which case the compensation to which three would be entitled shall be apportioned among them according to the services rendered by them respectively; and a like apportionment shall be made in all cases where there shall be more than one executor or administrator.

The provisions of this section only require, where there are three or more executors, to entitle them to three full commissions: 1. A personal estate exceeding \$100,000; 2. Three or more executors. No reference is made to the extent of the services required to be rendered by each to become entitled to a full commission, except that which is implied by the provision for apportionment; and this provision for apportionment is an implied recognition that one may render less than a fair proportion of the services and yet be entitled to full commissions for the purpose of apportionment. The provision

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giving full commissions to each is limited and qualified by the latter clause, directing the apportionment only, however, as to the manner and not as to the amount, for the wording is that where there are more than three "the compensation to which three would be entitled shall be apportioned," &c., and "a like apportionment shall be made in all cases where there shall be more than one;" that is, a like apportionment shall be made, in the case of two, of the compensation to which two would be entitled, and, in the case of three, of the compensation to which three would be entitled.

An apportionment of the compensation to which all would be entitled, "according to the services rendered," implies a taking from one and giving to another, and therefore one will receive more than a full commission and another less than a full commission, otherwise there is no need of an apportionment among them. If, then, a full commission is allowed for each executor to be apportioned, if all are living at the settlement, although one has rendered less than a fair proportionate share of the services, was it the intention of the legislature that it should be otherwise where an executor dies before the settlement? It is my opinion that it was not; for if the foregoing reasoning be correct, then the legislature intended by the expression "the compensation to which three would be entitled" to speak of it as one sum or amount, that amount to be ascertained by multiplying the commissions of a sole executor by the number of executors up to three; and in apportioning that amount, when ascertained, the same law should apply as would be the case in an estate of less than \$100,000 where there were several executors and one had died before settlement, *i. e.*, according to the services rendered by each.

This seems to me to be the only sensible conclusion, for otherwise a different rule would prevail in cases where no real difference existed; as where one executor, after having taken an active part in the administration of the estate, say for three months, voluntarily took no further part in such administration until the settlement, or was unable to do so by reason of death.

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Although, as I have said, this seems to be the only sensible conclusion; still I have been at some pains to state the reasoning which led me to it, for the reason that several lawyers of large experience to whom I have mentioned the subject were quite decidedly of the contrary opinion. It seemed to them anomalous that full commissions should be allowed in the case of an executor who had died before settlement, a part of which was to be apportioned among the survivors.

It is evident that the legislature, for some reason, intended to allow more commissions where the estate exceeds \$100,000, and it is also evident that we cannot adopt the amount of the commissions allowed as a valuation of the services rendered, for the reason that twice or three times as much commissions are allowed for administering estates of \$100,000 and upwards, depending only upon the number of executors acting; or, in other words, an executor is allowed just as much for rendering one-third of the services, when he is one of three executors, as he would receive for rendering all the services, if he were the sole executor, notwithstanding the fact that a sole executor is required to administer the estate just as fully as would be required of three executors; on the other hand, if he had a co-executor, who did very little of the work, he would be entitled to nearly two whole commissions. So we have all sorts of anomalies under this law, and we need not be surprised at finding another.

However, the testator is presumed to know the law, and he has it in his power to determine the amount of expense to which his estate shall be subjected, by way of commissions, by selecting one, two, three or more executors. He may even provide that they shall not be allowed any commissions (*Secor* agt. *Sentis*, 5 *Redf.*, 570; *Matter of Gerard*, 1 *Dem.*, 244), or he may fix the sum to be received by the executors in lieu of commissions (*Sec. 2737*).

Here three full commissions allowed by law to a sole executor should be apportioned, and, as those entitled to such commissions have agreed as to the manner of the apportionment, the decree will be made accordingly.

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SUPREME COURT.

THOMAS H. SENIOR agt. PETER MARCINKOWSKI and CATHERINE A. MARCINKOWSKI, JOHN DERRENBACHER, county treasurer, &c.

Taxes—Sale of lands for, by county treasurer—County treasurer may become purchaser—Tenant may acquire title from county treasurer as against his landlord—Laws of 1881, chapter 260.

By section 7 of chapter 260 of the Laws of 1881, the county treasurer of Ulster county was "empowered to acquire and hold" any lands which were sold for taxes, "and after the two years for redemption has expired, * * * to sell and convey the premises as such section directs." Where the county treasurer of Ulster county did "acquire and hold" the premises described in the complaint, under and in pursuance of the act aforesaid, and after the expiration of two years conveyed the same to the wife of the tenant occupying the premises:

Held, that a tenant is authorized as against his landlord to acquire an outstanding title. The title of the owner was extinguished by the sale. His right to redeem was cut off by the notice given pursuant to section 12 of the act, and as the county of Ulster had become the owner, there was nothing to prevent the wife of the tenant from becoming the purchaser.

Ulster Circuit, February, 1884.

Bernard & Fiero, for plaintiff.

A. B. Parker, for defendants.

WESTBROOK, J. — This action was brought to trial at the Ulster Circuit, held in February, 1884. It was submitted to the court for a decision upon the following facts, which were agreed upon :

The defendant, Peter Marcinkowski, on the 27th day of December, 1870, purchased the premises described in the complaint from Alanson Gillespie. On the 31st day of October, 1871, he, in connection with his wife Catharine A., mortgaged the premises to one James G. Terbell. Default having been made in the payment of such mortgage, Terbell,

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by action in this court, foreclosed the mortgage and became the owner and purchaser of such premises at the foreclosure sale on the 2d day of May, 1879. On the 10th of April, 1880, Terbell and wife conveyed the premises to William Chambers, who in a few days thereafter conveyed the same to the plaintiff.

Peter Marcinkowski has been in the actual occupation of the premises since the purchase by him, occupying the same as owner until the time of the foreclosure sale, and after that date as tenant of the subsequent owners of the property and of the plaintiff.

On the 9th of October, 1879, the premises were sold for the non-payment of taxes levied in the year 1878 by the treasurer of the county of Ulster, and on such sale were purchased by the treasurer in pursuance of section 7, of chapter 260 of the Laws of 1881. After his purchase the county treasurer gave the notice by publication required by section 12 of said act, but the premises were not redeemed within two years from the time of sale as required by law, and the treasurer conveyed by deed as authorized by the act aforesaid the premises to Catharine A. Marcinkowski for about the sum of seventy-four dollars. The defendant Peter Marcinkowski was in the actual possession of the property at the time of the tax sale and still continues in the possession thereof. The plaintiff did not know that there were any unpaid taxes upon said premises, nor that the premises had been sold on account of non-payment of taxes until after the giving of the tax deed to Catherine. James G. Terbell, the purchaser of the premises at the mortgage foreclosure sale, and William Chambers, his grantee, and the grantor of the plaintiff, were also ignorant of the existence of any unpaid taxes and of such sale. No other notice of the sale and purchase of the premises on account of the non-payment of taxes was given than the advertisement which has already been mentioned. On the 4th day of February, 1882, the plaintiff presented to Catherine A. Marcinkowski a notice in writing to the occupant of the

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premises requiring him to redeem the premises from such sale, which the said Catherine refused to do or to give any notice to the occupant.

On the 23d of February, 1882, the plaintiff caused to be tendered to the county treasurer of Ulster county an amount sufficient to redeem the premises from the tax sale, which amount the said county treasurer refused to receive. The value of the premises is about \$800. Upon these facts the plaintiff insists that he is entitled to redeem the premises from the sale, and asks that a decree should be made giving him such right to redeem.

By section 7 of chapter 260 of the Laws of 1881, to which chapter reference has already been made, the county treasurer of Ulster county was "empowered to *acquire* and *hold*" any lands which were sold for taxes, "and after the two years for redemption has expired * * * to sell and convey" the premises as such section directs. The county treasurer of Ulster county did "acquire and hold" the premises described in the complaint under and in pursuance of the act aforesaid, and after the expiration of two years conveyed the same to Catherine A. Marcinkowski one of the defendants. It is admitted that prior to the sale to Catherine, the county treasurer gave the notice required by section 12 of the act aforesaid by publication. That section provides "that as to all lands acquired and held by the county, such notice shall be sufficient in lieu of all notice required by law." Such a notice by publication dispenses with the personal notice required by the general laws (2 R. S. [7th ed.], 1030, sec. 68) to be given to the actual occupant, even though the expression—"the person *occupying* such land"—used in the statute be applicable to the plaintiff.

It was argued, however, in behalf of the plaintiff, that as the lands were not now held by the county, section 12 of the act of 1881 was not applicable to him. But they had been acquired and were "*held*" by the county at the time the notice required by such section 12 was given, and the question

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is as to the sufficiency of the notice while the county "*held*" them. The county having acquired title, and having cut off all right to redeem, was in a position to sell and transfer its rights to another.

It was further argued that though the act of 1881 has repealed the law as to the necessity of serving a personal notice on the occupant to redeem, the owner still has six months to redeem. This position is unsound, because the additional six months time after the lapse of two years exists only in favor of a person entitled to a personal notice to redeem. As section 12, aforesaid, abolishes the need of notice by personal service when the county "*acquired and held*," it follows that there is no six months after the expiration of the two years in which the owner may redeem.

It is also apparent that section 12 was intended to cut off the necessity of a personal notice to the occupant when the county had become the purchaser at the sale from other sections of the act. Section 7 almost directly so says when it declares "*after the two years for redemption has expired*," the county treasurer may "*sell and convey*." If there was in any case more time given, why the expression "*the two years for redemption?*" and why authorize in *all* cases after that time elapses a sale and conveyance, which sale and conveyance (*secs. 10 and 11*) vests the title in the purchaser? During the examination of this case the thought suggested itself to my mind whether or not the right of the plaintiff to redeem could be preserved, as he was the landlord of the occupant of the premises, and such occupant being the husband of the purchaser from the county treasurer, and residing probably with her husband upon the premises. It seemed to my mind at first that it would be unjust to permit the tenant occupying the premises to acquire the title to the same as against his landlord who was ignorant of the existence of the tax and of the sale of the premises. The courts, however, have held that a tenant is authorized as against his landlord to acquire an outstanding title (*Nellis agt. Lathrop, 22 Wend., 121*;

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Hoag agt. *Hoag*, 35 N. Y., 469). The title of the owner was extinguished by the sale. His right to redeem was cut off by the notice given pursuant to section 12 of the act, and as the county of Ulster had become the owner, there was under the cases which have been cited nothing to prevent the wife of the tenant from becoming the purchaser.

The complaint of the plaintiff is therefore dismissed, but without costs. The action is an equitable one, and costs are in the discretion of the court. While the tenant could legally acquire the title, yet his conduct in taking advantage of his knowledge to acquire the title is not commendable.

CITY COURT OF NEW YORK.

LEVI M. BATES, JOHN H. REED and MARTIN I. COOLEY,
plaintiffs and appellants, agt. JOSEPH PIMSTEIN, defendant
and respondent.

*Attachment—Affidavit by agent—Sufficiency of—Code of Civil Procedure,
section 636.*

The affidavit of C., on which the attachment was granted, alleges that "he is the agent and one of the salesmen for the plaintiffs herein; that at certain specified dates the plaintiffs sold and delivered to the defendant at his special instance, goods of a certain value, no part of which has been paid, although deponent has demanded payment of the defendant, and said sum is due to the plaintiffs herein from the defendant, over and above all claims and offsets:

Held, that this affidavit fulfills the requirements of section 636 of the Code of Civil Procedure. An agent and salesman is presumed to be familiar with the every day occurrences and general routine of his employer's business affairs, and to have better, or at least as good, knowledge of the condition of things between the plaintiffs and the defendant as the plaintiff himself. It is not necessary for him to account for his knowledge.

For the same reason it is not necessary for him to account for his making the affidavit in consequence of his employer's absence from the State.

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Nor is the affidavit insufficient because of the omission of the clause "known to them." It is made not only by an agent, but by a salesman of the plaintiffs, and the cause of action arises out of a sale of goods; it was made on knowledge, and the well known rule of law applies that "the law will not infer that matters positively sworn to were not within the personal knowledge of the affiant."

General Term, February, 1885.

Before HYATT and HALL, JJ.

APPEAL from an order vacating the plaintiffs' attachment against the defendant.

Abr. Gruber, plaintiffs' and appellants' attorney.

Sampter & Platzek, attorneys for subsequent lienors, respondents.

HYATT, J. — It is claimed in support of the order vacating the attachment, that the affidavit upon which it was granted was insufficient, for the reason that "there is nothing therein contained showing any knowledge in the agent of the fact whether the defendant has any counter-claims or offsets, or any admission on the subject made by the defendant, nor is there any reason assigned why the affidavit as to no counter-claims was not made by one of the plaintiffs."

The affidavit of Cohen alleges that "he is the agent and one of the salesmen for the plaintiffs herein; that at certain specified dates the plaintiffs sold and delivered to the defendant at his special instance, goods of a certain value, no part of which has been paid, although deponent has demanded payment of the defendant, and said sum is due to the plaintiffs herein from the defendant, over and above all claims and offsets. This affidavit fulfills the requirements of the statute (*Code Civil Pro.*, sec. 636).

This case does not fall within the rule of *Murray agt. Hamkin* (30 *Hun*, 37). In that case the objection was taken that the affidavit of the agent stated that the plaintiff was

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entitled to recover a sum, over all counter-claims, to the knowledge of *deponent*. The court held that if the allegation had stated "to the knowledge of the plaintiff," it would have been sufficient.

The learned chief justice, dissenting from the decision of the court vacating the attachment on this objection, remarked that "the agent evidently had better, or at least as good, knowledge of the condition of things between the plaintiff and the defendant as the plaintiff himself."

Nor will the case of *Cribben* agt. *Schillinger* (30 Hun, 242) avail the subsequent lienors. In that case the affidavit was made by one of the plaintiff's attorneys that "a sum was due over all counter-claims known to the plaintiff or to the deponent." The court held that the fact that the affidavit was made by the attorney and not by the plaintiff was sufficiently accounted for, it having been shown that the plaintiff resided out of the state, and it might have sufficed if it appeared that he had any knowledge as to the existence of counter-claims, and perhaps it would have been enough (though as to that we express no opinion) if he had stated that he *was informed* by his clients that none existed.

The reason of this rule is apparent; an attorney-at-law is not presumed to be familiar with the every day occurrences and general routine of the personal business of his clients; but an agent and *salesman* usually is so; he is constantly and almost exclusively engaged in and about his employer's business affairs; he buys and sells goods for him; he is acquainted with the financial equipoise existing between his employer's customers and his employer, for upon that knowledge frequently depends the terms of credit and dealings between them. For the same reason it is not necessary for him to account for his making the affidavit in consequence of his employer's absence from the state.

The only point remaining for consideration is the effect of omitting the clause "known to them." As to that it would seem that the ruling in the case of *Lampkin* agt. *Douglass*

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(27 *Hun*, 517) must be followed here. It is the only case reported in the courts where the effect of this omission has been passed upon. The affidavit in that case was made by the agent, the clause in question was omitted, and it was held sufficient by the general term of the third department.

The affidavit in the case at bar was made not only by an agent, but by a *salesman of the plaintiffs*, and the cause of action arises out of a sale of goods. It was made on knowledge, wherefore the well-known rule of law applies that "the law will not infer that matters positively sworn to were not within the personal knowledge of the affiant" (*Pierson agt. Freeman*, 77 *N. Y.*, 589; *Brooklyn Daily Union agt. Heyward*, 11 *Abb. [N. S.]*, 235).

The order vacating the attachment should be reversed, with costs, and the attachment reinstated.

N. Y. SUPERIOR COURT.

ROBERT LONGDEN and another, appellants, agt. DAVID H. BROWN, respondent.

Bill of particulars — Appeal — Code of Civil Procedure, section 531 — When order that plaintiffs furnish bill of particulars discretionary, and will not be interfered with on appeal.

Where defendant is not entitled to a bill of particulars as a matter of right, but, on a demand by defendant, plaintiffs serve a defective one, an order that plaintiffs furnish a further bill is a matter of discretion, and will not be interfered with on appeal.

General Term, March, 1885.

Before SEDGWICK and O'GORMAN, JJ.

THE complaint alleged an indebtedness of the defendant on a guarantee that the firm of Lowry & Brown would pay for all goods (woolens) sold and delivered by plaintiffs to said

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firm. The answer admitted the indebtedness, but set up a counter-claim for damages by reason of the defective character of said goods. Plaintiffs obtained an order that defendant serve a bill of particulars of said claim for damages specifying the number marked on each piece of damaged goods. Defendant then demanded from plaintiffs a bill of particulars of their claim. A defective bill having been served in compliance with such demand, defendant, on notice, obtained an order that a further bill be served specifying the numbers on all goods sold to Lowry & Brown; and from this last order plaintiffs appealed.

Francis Forbes, for appellant.

William H. Sage, for respondent.

SEDGWICK, J.—The action was not upon an account and the complaint did not allege any account (*Sec. 531, Code Civil Pro.*) The plaintiffs were not bound, therefore, by this section to give particulars upon the mere demand of defendant's attorney. They did, however, yield to a demand made that they "serve a copy of the account or claim for goods sold and delivered set forth in the complaint herein," and served upon the defendant's attorney something that has the appearance of a bill given by a merchant to a customer, but containing only charges of money as due at specified dates. There is nothing to show whether or not this is a copy of anything. On receiving this, defendant's attorney took an order to show cause why plaintiffs should not give a further bill of particulars specifying thereon the number of each piece of goods sold to the firm of Lowry & Brown. The court ordered that such a bill be given, and from this order this appeal is taken. If the validity of the order depended upon whether, if the first bill served was one that could not properly be demanded, there could be a further bill ordered on the ground of defendant's absolute right to it, there might be ground for doubt. Substantially, however, after the plaintiffs had voluntarily

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furnished what they did furnish, it was a question for the discretion of the court whether further particulars should be given, for under the last sentence of the section specified, the court may in any case direct a bill of the particulars of the claim of either party to be delivered to the adverse party. The matter that shows that the court exercised discretion properly is that it appearing that the plaintiffs had procured an order for the particulars of the defendant's claim for a recoupment on account of the bad condition of some of the goods averred by the complaint to have been sold, the present order was a facility, for the defendant's making his bill of particulars, that the plaintiffs should give.

Order affirmed, with ten dollars costs and disbursements to be taxed.

SUPREME COURT.

MARY SMITH agt. JAMES DUFFY.

Assignment—Through fraud—Deed—When will be declared null and void.

Although it is not enough to induce a court of equity to interfere to show that a bargain is hard and unreasonable, nor does mere inadequacy of consideration alone form a ground for equitable relief; yet there are cases where there is no positive evidence of fraud, in which the inequality of the bargain is so gross that the mind cannot resist the inference, that though there be no direct evidence of fraud, such a bargain must have been in some way improperly obtained.

In such cases a court of equity will avoid a bargain, not merely on account of its gross inequality, but because that inequality furnishes the most vehement presumption of fraud.

Special Term, December, 1884.

George F. Langbein, for plaintiff.

William J. Kane, for defendant.

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LAWRENCE, J.—William E. Duffy, the brother of the plaintiff and the defendant, died on the 30th day of August, 1876, intestate, at the town of Portland, in the state of Connecticut, seized and possessed in fee of four lots of land in the city of New York, situated on the northerly side of West One Hundred and Thirty-fourth street, between Seventh and Eighth avenues. The plaintiff and defendant, as heirs-at-law of William E. Duffy, were each entitled to a one-seventh part of his said real estate, and on the 16th of May, 1883, an action was commenced for the purpose of obtaining a partition and division of the said lands among the different heirs-at-law of the said intestate. The defendant, James Duffy, seems to have been, up to a certain point, the adviser of his sister, and it appears by the evidence that he procured an answer in said action to be put in in her behalf, said answer having been verified on the 27th of March, 1882. On the 5th of June, 1882, the plaintiff executed and delivered to the defendant a conveyance or assignment of all her right, title and interest in and to the lands above referred to, which assignment or transfer is expressed to have been made for the consideration of sixty dollars. The evidence shows that the property in question was worth about \$18,000, and that after deducting the incumbrances thereon, it was worth at least the sum of \$15,000. Assuming such to have been the true value of the property, it is apparent that the plaintiff's share exceeded the sum of \$2,000 in value, and this action is brought by the plaintiff to set aside the assignment, who alleges in her complaint that she did not understand the purport and effect of the assignment; that the same was procured by fraudulent representations made to her by the defendant; that the same was a paper necessary for her to execute for said action in partition to progress the said suit, and that the same was executed under the belief that there might be something wrong about the other paper, to wit, the answer put in in the action for partition, as above stated.

The plaintiff further alleges that she was on the 3d day of

Smith agt. Duffy.

May, 1883, for the first time informed that the defendant had claimed that she had assigned all her right, title and interest in said lands to him, and she alleged that she never had any knowledge until the month of May, 1883, of that assignment. The answer of the defendant denies all fraud, and the contention of the defendant in substance is that the transaction in question was made in good faith, and that no undue influence was exerted to bring about the execution of the assignment. Although the assignment was executed on the 5th of June, 1882, it was not recorded in the register's office until the 22d of August, 1882.

This action was commenced on the 16th of May, 1883, and on the 29th of August, 1883, the plaintiff became insane and was taken to an asylum. On the 22d of June, 1883, the plaintiff's deposition was taken before a referee, and that deposition certainly sustains the position taken by the plaintiff in her complaint. I have read the evidence submitted on the part of the defendant tending to show that the transaction in question was fair and honest and that no undue influence was brought to bear upon the plaintiff to induce her to execute the assignment now sought to be set aside, but I am compelled to say that the perusal of that evidence has failed to satisfy me that the transaction is one which equity ought to uphold. It is quite true that it is not enough to induce a court of equity to interfere to show that a bargain is hard and unreasonable, and that mere inadequacy of consideration does not alone form a ground for equitable relief, but, as was said by Mr. justice HARRIS, in the case of *Dunn agt. Chambers* (4 Barb. Sup. Ct. R., 379): "There are cases where there is no positive evidence of fraud, in which the inequality of the bargain is so gross that the mind cannot resist the influence that though there be no direct evidence of fraud, such a bargain must have been in some way improperly obtained. In such cases the court of equity will avoid a bargain, not merely on account of its gross inequality, but because that inequality furnishes the most vehement presumption of fraud."

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In my opinion the evidence brings this case within the principle so ably stated by that learned justice. It is conceded that but sixty dollars in cash was paid by the defendant to the plaintiff at the time the assignment was executed. The defendant stated in his testimony that he had befriended the plaintiff for many years, and has given her different sums of money at various times. He also claims that he furnished the money that was requisite to defray the funeral expense of plaintiff's husband. He is contradicted substantially in this respect by other witnesses, but assuming his statement to be true, as that consideration was paid about thirty years before the execution of the assignment, it cannot now be relied upon to support the assignment. Assuming that the defendant did pay all the sums which he claims to have paid for the plaintiff, the value of the property transferred to him was so much in excess of the aggregate of those sums as to leave the consideration for the assignment still grossly inadequate.

In this case the plaintiff was an ignorant woman, unable to read or to write, who relied, as the evidence shows, very much upon the superior knowledge and ability of her brother, the defendant. Indeed, in her deposition she says: "I thought so much of my brother that I would sign any paper he presented to me, believing it to be right." It will also be seen that in the deposition she denies that she ever received a single cent from her brother over and above what he actually owed her. The evidence of Mr. Mehrzbach corroborates the defendant in his assertion that he actually paid the sixty dollars to the plaintiff. Even if she is in error in that respect, however, I think the whole case shows that advantage was taken of ignorance by her brother, in whom she had implicit confidence, to obtain an assignment of her interest in her deceased brother's property, which assignment is founded on a grossly inadequate consideration, and that the assignment cannot be supported upon well established principles of equity. In addition to the case decided by Mr. justice HARRIS, already referred to, the case of *Whelan* agt. *Whelan* (3 Cow., 337),

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Which I have treated in analogy to the case now under consideration. It is further submitted. (See, also, Willard's *Principles of Law*, 1891, pp. 245-246, and cases cited).

THE COURT is satisfied by the plaintiff, declaring the

SMITHSONIAN INSTITUTION

VERNON L. BERRY vs. **JOHN F. BERRY** defendant.

Address— Their duty as officers of the court is connected with their
DEED & JUSTICE.

It is the duty of the Attorney General, as an officer of the court, to furnish all information requested by the court, in order that every case be properly decided.

On 11/11/1964, the defendant was directed to state the following: "The defendant is that an injunction could be served upon him and that a statement of the defendant of the plaintiff which was made."

And that the attorney was properly charged with all the expenses of the litigation & awarded the plaintiff's attorneys on the ground of NEGLIGENCE.

For Information Contact: January, 1985.

Ex. 1. LITH. P. J.: EAST and DAVIS II.

Answer by attorney for plaintiff from an order made by Mr. Justice Lawrence imposing upon him all the costs and referee's fees on the reference, which was ordered to ascertain the whereabouts of the plaintiff, so that an information could be served upon him.

Hamilton Odell, for appellant.

Samuel Utermeyer, for respondent.

BRADY, J.—This action was commenced for the dissolution of a copartnership and an accounting, and the summons

Baur agt. Betz.

served on the 13th of January, 1883. On the twenty-seventh day of January following, an order was obtained, *ex parte*, appointing the defendant temporary receiver of the partnership effects and granting an injunction restraining the plaintiff and his attorney, among other things, from interfering with such effects, and requiring the attorney to show cause on January thirtieth why he should not disclose to the attorney for the defendant the then present residence or abode of the plaintiff, the object of which undoubtedly was to enable him to serve a copy of the injunction. The motion was finally argued, and the injunction and the appointment of the receiver made permanent. In that proceeding the plaintiff's attorney made an affidavit in which, among other things, he stated as follows:

"I further aver that the plaintiff's residence was formerly No. 140 East Fifty-eighth street, this city, but I am informed that his residence is now at 317 East Seventy-ninth street, this city, and I am further informed that these facts are well known to the defendant."

The special term, also, in the order confirming the appointment of the defendant as receiver and containing the injunction, made a reference to Abram Kling, esq., to take proof of the whereabouts of the plaintiff, the statement of his attorney as to his residence not being satisfactory, and some dispute as to the attorney's statement having arisen and being urged. The order of reference is not before us on this appeal, but, according to the report of the referee, it was quite comprehensive, because it provided that he should take proof of the then present residence or abode of the plaintiff and as to his whereabouts, and also testimony as to the transactions between the plaintiff and his attorney and between the plaintiff and any other person, with the view of ascertaining the fact as to where the plaintiff could be found, and also to examine such witnesses as might be produced before him in respect to other facts contained in the affidavits used on the motion, which resulted in the order of reference.

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The testimony taken by the referee is very voluminous, extending to 245 pages and upwards. The plaintiff was represented by Hamilton Odell, esq., and the attorney appeared on his own behalf. The referee found that the defendant had sought with the greatest diligence to ascertain the whereabouts of the plaintiff, and in every way known to him tried to discover where he could be found; that he was last seen in the city of New York on or about the 25th of January, 1883, at the corner of Fifth avenue and Forty-sixth street, in front of the residence of and in company with his attorney, from which place he proceeded to the "Windsor" or "Taylor's" hotel, in Jersey City (the hotel being known by both names at different periods), where he registered under the name of Bennett, and which place he left on the twenty-sixth of January, the day following. The referee further reported that he was unable, from the evidence furnished him, to report as to where he went or his then present whereabouts.

An examination of the testimony shows that it was not strictly confined to the chief question which was designed to be the subject of investigation — namely, the then present residence or whereabouts of the plaintiff — but at the same time it cannot be said that the referee was not justified in taking a great deal of the evidence which was given under that portion of the order already mentioned which authorized him to examine the witnesses produced before him in reference to such other facts as were contained in the affidavits on the motion which resulted in the order of reference.

The statement in the affidavit of the attorney, as to the whereabouts of the plaintiff, was disingenuous. It was, as we have already seen, that the plaintiff's residence was at 317 East Seventy-ninth street in this city, when he knew, as he himself admitted during the investigation before the referee, that his client had gone to Jersey City, and was staying at a hotel there, and under an assumed name. It may be true that at the time of his client's departure he did not know in what direction he went, and it may be true, also, that at the

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time of his examination he did not know to what place his client had gone or where he was staying; but the relations existing between the two, and the proceedings between them, render this exceedingly improbable and certainly justify the conclusion that the attorney did not respond to the application made in reference to the whereabouts of the plaintiff as he should have done and as he was bound to do as an officer of the court.

It cannot be questioned that the service of the injunction upon the plaintiff was very important to the protection of the defendant's interests, and it was just as much his duty to aid in the administration of justice in that respect as it was to protect his client's interests. As an officer of the court he was bound to deal with it in all respects without reserve, and to obey its orders implicitly unless appealed from and reversed on appeal. If he had stated in his affidavit that his client had resided and he believed continued to reside at the place named in this city, but had been sojourning in Jersey City under an assumed name, and that he had parted from him on the twenty-fifth of January, and then stated what he believed as to his intentions, his conduct would have appeared upon the record in reference to the subject unimpeachable. He suppressed, however, these important facts, and it would seem with the intention of screening his client. In his zeal he may have supposed that this was his duty professionally, but it was a great mistake if he entertained any such view, and the result is the imposition of costs upon himself and his client in the proceeding which a candid and honorable revelation would not only have avoided but which would have redounded to his credit as an officer of the court.

If it be necessary to teach the lesson that a member of the bar belongs to a high and honorable profession, and in the manner in which that instruction has been conveyed by the result of this proceeding, it must be done. The court has power to impose the payment of costs, and it is impossible for us to say, with any justice to the learned judge who made

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the order in that respect, that the discretion vested in him was in the slightest degree abused. On the contrary, we think he was quite justified in making the order, notwithstanding that it must be admitted some of the evidence taken would seem unnecessary upon the main subject which the reference was intended to investigate.

Under these circumstances, there is nothing left for us but to affirm the order.

Ordered accordingly.

DAVIS, P. J., and DANIELS, J., concurred.

SUPREME COURT.

CORNELIUS K. GARRISON agt. PETER MARIE and others.

Injunction — Suit to restrain parties from prosecuting an action in another court — When injunction restraining such prosecution will be granted — Proper practice in such cases.

In March, 1876, the plaintiff herein was the owner of a large number of bonds of the Pacific Railroad of Missouri, purporting to be secured by a mortgage known as the third mortgage upon the property of said railroad. At this time an action in which one George E. Ketchum was plaintiff, was pending in the United States circuit court for the eastern district of Missouri to foreclose this third mortgage. Certain stockholders intervened in said foreclosure suit, and filed an answer and cross-bill alleging collusion and fraud on the part of the directors and managers of said Pacific railroad in the issue of said bonds, and in the mortgage made to secure the payment thereof.

Defendants herein, acting as a committee of stockholders, owning and possessing in their own right, or in trust for others, a large number of shares of the capital stock of the said Pacific railroad, in March, 1876, applied to the said United States circuit court to be allowed to intervene and defend the said foreclosure suit on their own behalf, and in behalf of all other stockholders. Plaintiff herein, on his own application was made a co-complainant in the foreclosure suit.

Defendants herein, under an arrangement with the plaintiff herein, ceased all opposition to the foreclosure suit and consented to a decree of foreclosure, which decree was entered on the 6th of September, 1876.

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The property of the said Pacific railroad was sold under said decree on the sixth of September following, and bid in for \$3,000,000, by Baker, the solicitor of said Pacific railroad, for a combination of bond-holders who acted in opposition to the plaintiff herein.

Defendants herein, at once resolved to resist the decree of foreclosure and sale thereunder, and to take all legal means in their power to set the same aside. They opposed the confirmation of the sale, and in said month of September, applied to the said circuit court for liberty to intervene to set aside the decree of June 6, 1876, and the sale thereunder, and for liberty to demur, answer, plead or appeal, as advised.

In March, 1877, at a meeting of stockholders held at St. Louis, defendants herein, by means of stock owned and controlled by them, procured several of themselves to be elected officers and directors of said Pacific railroad; and thereafter caused to be taken and prosecuted an appeal in the name of said Pacific railroad to the supreme court of the United States from the said decree of foreclosure, which appeal was decided in the October term of 1879 (*Pacific R. R. agt. Ketcham*, 101 U. S. R., 289).

The court held that there was no error which could be corrected on appeal from the decree, but that a redress of grievances, must be obtained if any there were, by application to the court in which said decree was made.

Thereafter, in 1880, the defendants herein caused a suit to be commenced in the name of said Pacific railroad against the plaintiff herein and other parties, to set aside said foreclosure and sale and have the said third mortgage and third mortgage bonds set aside as fraudulent and void. A demurrer was interposed to the bill of complaint, which was sustained by the said United States circuit court.

An appeal was taken to the supreme court of the United States. The decision of the court below was reversed (111 U. S. R., 505), and the cause was remanded to the said circuit court with directions to overrule the demurrer with costs, and to take such further proceedings in the suit as should be proper and not inconsistent with the opinion of said supreme court. The court held that the said bill of complaint was, in substance and effect, a continuation of the said Ketcham foreclosure suit.

In 1878, the defendants herein commenced an action in the superior court of the city of New York against the plaintiff herein, to recover \$3,600,000 with interest from the 24th of October, 1876, on the ground that in 1876 he agreed with them to organize a successor company to the said Pacific railroad, and give them in exchange for thirty-six thousand shares of the capital stock of that company a like number of shares in such successor company, they alleging in their verified complaint that plaintiff herein agreed to do this in consideration of the relinquishing by them of all further opposition to the Ketcham foreclosure suit. They averred in their said complaint, that without their co-operation and consent the

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said decree of foreclosure and sale would not then have been made. By consent of parties this action was referred to Hon. THEODORE W. DWIGHT to hear and determine. The trial before the said referee was commenced and prosecuted before him until the 24th of May, 1884, when it was suspended until December 19, 1884.

This action was commenced to restrain the defendants herein from further prosecuting the trial of the action in the said New York superior court, until the said action pending in the said United States circuit court for the eastern district of Missouri shall have been finally determined. A preliminary injunction having been granted on motion of plaintiff to continue such injunction *pendente lite* :

Held, that this court has undoubtedly power to restrain parties from proceeding with actions in other courts of this state, whether they be such as under the former division would have been known as actions at law or suits in equity.

Held, that the facts established a clear case for the interposition of a court of equity to prevent injustice and wrong, and that the injunction should be continued *pendente lite*.

Held, that the suits and legal proceedings of the defendants herein being glaringly inconsistent and contradictory, they having elected in the first instance to rescind their alleged contract with the plaintiff herein, they should be required first to proceed with the suit grounded upon that election.

Held, that upon the facts appearing in the motion papers, the proper course of the plaintiff was to bring an action for relief, and not to apply in the New York superior court case, for a stay of proceedings.

Special Term, March, 1885.

MOTION on the part of plaintiff to continue a temporary injunction obtained by him to restrain the defendants from prosecuting an action in the superior court until the final decision of a case pending in Missouri.

C. A. Runkle and Henry L. Clinton, for plaintiff.

Mason W. Tyler, Clarence A. Seward and Roscoe Conkling, for defendants.

DONOHUE, J. — This is a motion to continue an injunction pending the litigation. The facts, as they appear in the papers on which the motion is made, and most of which are not disputed by the defendants, are substantially as follows :

The plaintiff, in 1875, was the owner of about \$1,800,000

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of the third mortgage bonds of the Pacific railroad of Missouri. The railroad had defaulted in the payment of interest on all its bonds of this class, and a suit to foreclose the mortgage was commenced November 11, 1875, by George E. Ketchum, in the United States circuit court for the eastern district of Missouri, and Garrison became a co-complainant on his own application. The Pacific Railroad Company admitted the allegations in the bill of foreclosure, but Marie and others, the defendants in this action, who were stockholders of that company, claimed that the third mortgage bonds were illegal and void, and petitioned the court in which the foreclosure was pending, for leave to defend the suit on behalf of themselves and other stockholders. After filing their petition, the defendants here made an agreement with Garrison, by which, in the letter addressed to them May 29, 1876, he promised that, if he purchased the railroad under the foreclosure sale, he would convey it to a new corporation, to be organized by them, the stock of which should belong to the defendants here (who, to prevent confusion, will be referred to in this opinion as the "Marie party"), while the bonds of such corporation should be received by Garrison in payment of his third mortgage bonds of the Pacific railroad. The Marie party, in consideration of this promise, agreed to withdraw their opposition to the foreclosure of the mortgage and aid in validating Garrison's bonds. They did thereafter, in open court, withdraw such opposition, and, in consequence of such withdrawal, a decree of foreclosure was entered in June, 1876.

The Marie party claim that after such decree was entered they and Garrison made a new oral agreement, the terms of which are disputed, by which the Marie party assert that Garrison agreed, absolutely and unqualifiedly, to purchase the road on the foreclosure sale, no matter how much he had to pay for it, and also to organize a new corporation in Missouri, to which he would convey the railroad, the stock of which corporation should consist of 80,000 shares, of which 36,000 shares were to be transferred to the Marie party, in consid-

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eration of their aid in securing a foreclosure of the road. The letter of March 29, 1876, was thereupon surrendered to Garrison, who, while he admits the making of some oral agreement, denies that it was such an agreement as the Marie party claim it was, and specifically denies that he bound himself absolutely to purchase the road. On September 6, 1876, the road was sold at public auction, under the decree in the foreclosure suit, to one James Baker, who bid a higher price than Garrison. But by a subsequent arrangement between Baker and Garrison, the latter was substituted as purchaser, and he thereafter conveyed the property to a new corporation, and subsequently, by a purchase of the stock of such new corporation, the railroad became, and now is, the property of still another corporation, the present Missouri railroad company.

On becoming such substituted purchaser, Garrison refused to comply with the terms of the alleged oral agreement set up by the Marie party, and thereupon the latter, immediately and before the sale was confirmed by the court, took measures to set it aside, and, claiming to act as a committee representing on their own account and that of other stockholders 36,000 shares of the stock of the old company, on September 6, 1876, passed the following resolution in reference to the foreclosure proceedings:

"Resolved, That we will resist the said decree of foreclosure and the sale made thereunder to the best of our ability; that we will appeal the suit in which the decree was made to the supreme court of the United States for the redress of our grievances; that we will continue the prosecution of the suit commenced by us in the name of N. A. Cowdrey against the Pacific railroad and others, for fraud on the stockholders, which suit is now pending in the circuit of the United States for the eastern district of Missouri."

They at once notified Garrison that they repudiated the sale, and took an appeal from the decree of foreclosure, representing to the court that they were acting for all the stockholders of the Pacific railroad, which appeal was carried to the

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supreme court of the United States, and upon which it was claimed by the Marie party that the sale was irregular, that the third mortgage bonds had been fraudulently issued and were void, and that the decree of foreclosure and the sale under it should be set aside so that the validity of the mortgage could be determined. While this appeal was pending for the purpose of getting back the railroad, and which appeal was controlled and carried on by the Marie party, an action was commenced in April, 1878, in the superior court of New York city, by the same Marie party against Garrison, in which it was claimed that Garrison had failed to perform his part of the contract in refusing to deliver to them 30,000 shares of stock in the new corporation, although they had consented to the decree of foreclosure, and had done all in their power to validate the third mortgage bonds, and that by such failure they had suffered damage to the amount of \$3,600,000, with interest from October 24, 1876. While this suit in the superior court was pending, the appeal to the supreme court of the United States, so taken by the Marie party, was dismissed. The court suggested that if there was fraud in the creation of the third mortgage, and the issue of the bonds secured by it, a suit in equity could be brought to set aside the decree of foreclosure and the sale, and to test the validity of the mortgage.

The case is reported in 101 *United States Reports*, 289. Upon this the Marie party having become directors, Cutting having been elected president and Marie vice-president, and thus, by reason of their holding a majority of the stock of the Pacific railroad, having absolute and complete control of the management of that company, commenced a suit in the United States circuit court for the eastern district of Missouri against the new Missouri Pacific railroad, which had purchased the railroad, and against Garrison, to set aside the decree of foreclosure and sale, and to have the third mortgage bonds declared void. A demurrer to the bill in this suit was finally overruled by the supreme court of the United States, and it

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was there held that if the irregularity in the decree and sale could be established and the fraudulent character of the third mortgage bonds proved, the decree could be set aside and the railroad restored to the old company (*see* 111 *U. S. Rep.*, 505). As I understand that suit, it is now at issue upon a plea of the Missouri Pacific company and an answer of Garrison.

While, therefore, the suit in the superior court is now on trial before the referee, in which the Marie party are demanding damages amounting to over \$5,000,000 against Garrison, on the ground that they consented to a decree of foreclosure and sale and aided in validating the third mortgage bonds, and that he refuses to compensate them for so doing, the same individuals, acting through the corporation of the old Pacific railroad, which is absolutely under their control as stockholders and offices, are demanding in Missouri that the decree of foreclosure and the sale of the railroad be set aside and the bonds held by Garrison declared worthless.

The plaintiff Garrison, in this present suit, asks, as a matter of equity, that the defendants, the Marie party, be restrained from prosecuting their action in the superior court until the action in Missouri has been finally determined. He claims that the defendants are causing him great expense and embarrassment in subjecting him in two states to litigations based upon conflicting and contradictory grounds, and that inasmuch as immediately after the sale under the foreclosure the defendants expressly repudiated the sale, and from that time to the present have made persistent, vigorous and unremitting efforts to set aside the decree and sale, get the railroad back and obtain a decision that his bonds are worthless, they should, at any rate, be required to prosecute to a final determination their suit based on a disaffirmance of the contract in the Missouri court, which has jurisdiction of the whole controversy, and in which suit only the title to the road can be determined before prosecuting him here in an action which is based on an entirely inconsistent and different

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right. There is but little dispute about the facts, so far as they are involved in the present motion.

The defendants, the Marie party, insist that in due course they will succeed in setting aside the decree of foreclosure and secure a judgment that Garrison's bonds are worthless, and if, as they claim they expect to, they should also recover a judgment against Garrison in the superior court for over \$5,000,000, they may inflict irreparable injury upon him. If they succeed in the Missouri suit they will recover the railroad for the corporation in which they hold a majority of the stock, and in effect become part owners of the very property, for the sale and loss of which they will already have been compensated by the judgment and satisfaction in the superior court; and in addition to this they will render the Garrison bonds of no value.

If these results are to follow, and the defendants insist they will, it does not appear how Garrison can escape a double loss, involving apparently his financial ruin. While the parties to the suit in the superior court, and to that in the Missouri court, are in reality the same, they are not the same on record or in name. In the Missouri suit the Marie party use the name of the Pacific railroad, and claim to act for the benefit of all the stockholders of that corporation, which, for all purposes except the maintenance of that action, is practically defunct, while in the superior court they sue in their individual names as a committee representing 36,000 shares of stock in that old company. A judgment, therefore, either against or for the plaintiffs in the superior court suit (the Marie party) could not be pleaded by Garrison as a defense in the Missouri suit, because such judgment would be in favor of individual stockholders with whom the plaintiff of record in the Missouri suit has no privity in a legal sense. There might in such case be equities arising between Garrison and the Marie party who are beneficiaries in the Missouri suit, but such equities could not be established in that suit.

It must be assumed, for the purposes of this motion, that

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the Marie party may obtain judgment in their favor, not only in the superior court suit, but also in that in Missouri. They cannot insist, upon this motion, and they do not, that they may succeed in one suit and be defeated in the other. Their theory is that they will prevail in both. If they choose to put themselves in the attitude of prosecuting Garrison in separate conflicting actions in different states, it must be assumed that they have considered the result of such actions. To prevail in both suits would be to oppress Garrison with a double liability and loss arising out of the same transaction; he being powerless to plead any judgment obtained against him here as a bar in the Missouri suit, and whatever remedy he might have to avail himself of such a judgment would be of the most circuitous and unavailable character.

I had supposed it to be elementary law that if a person having the right to affirm or disaffirm a contract, chooses to do the latter, and brings an action or takes other steps based on such disaffirmance, he cannot afterwards be heard in a court of justice to assert the contrary. This rule has nothing to do with the election of remedies, but is based upon the doctrine that when a person has made an election as to rights he should not afterwards be permitted to change his position and set up an inconsistent right. I must confess, therefore, that I do not understand how the Marie party can maintain the action in the superior court after they have adopted the resolution of September 6, 1876, above quoted, and after they have opposed the confirmation of the sale under the foreclosure, and when, from that day to the present time they have been striving and at this moment are endeavoring by every means in their power to obtain a judgment in Missouri setting aside the decree of foreclosure and restoring the railroad to a company in which they hold the majority of the stock and declaring Garrison's bonds to be worthless. This was apparently the view taken by Garrison's counsel in the superior court suit, for they pleaded these matters in bar of the action. The learned referee in that action, however, as I understand the

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matter, has taken a different view, and has held that the adoption of such resolution and the taking of various legal proceedings, including the suit now pending in Missouri, are not of themselves a bar to the action before him. However much I may differ from him on this point, it is not my province to review his decision, but for the purposes of this motion I must, and do assume his decision to be correct. I understand, however, that the referee concedes that if the Marie party should prevail in the Missouri suit, and obtain a judgment setting aside the decree there, they could not afterwards succeed in the suit before him; and I do not see how it can be doubted that such would be the result. In other words, it is clear that while Garrison could not plead a judgment obtained against him in the superior court suit as a bar to the further prosecution of the suit in Missouri, he could, under the peculiar circumstances of the case, plead a judgment obtained against him in the Missouri suit as a bar to the further prosecution of the action in the superior court, although the nominal parties of record are not the same. It is, therefore, of the very greatest importance to him that the action in the Missouri court should be prosecuted to a final termination before the trial of the action here. It is certainly nothing but common justice that he should have an opportunity to plead the judgment against him in Missouri, if one should be obtained, as a bar to the action here, especially as the existence of the two suits and their relation to each other depended upon the voluntary acts of the Marie party and are entirely under their control. It follows, therefore, that the position of the referee, that the mere pendency of the action in Missouri is not a bar to the action here, is the very reason why the proceedings in the action in the superior court should be stayed until the suit in Missouri has been disposed of, or that the Marie party should be compelled to elect — if, as the referee seems to think, they have not done it — which action they will prosecute to final judgment, and, having made such election, be forever restrained from prosecuting the other.

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The referee's ruling does not affect the position taken by Garrison in the present action — that it is unjust and inequitable that he should be prosecuted in the superior court while another suit, which is the outcome of the defendant's prompt action in disaffirming the sale, and which is under their control, is pending, and which should be disposed of before the superior court suit is determined. The plaintiff here does not ask that the Missouri suit be held a bar to the suit in the superior court, but that, as a matter of equity, fairness and good conscience, the trial of the superior court suit should be stayed until the end of the litigation in Missouri. The relief asked in no way involves a defense of the action in the superior court, but is sought in an independent action involving rights and equities which have not been passed upon nor considered by the referee.

The learned counsel for Garrison has submitted upon this motion a large quantity of evidence taken in the proceedings had before the referee, and has raised a variety of questions which cannot properly be passed on by me. Whatever might be my opinion, it is not for me to decide whether the referee's rulings have been contrary to law, or whether they are inconsistent with each other, nor whether the referee has shown bias. The question whether the Marie party, claiming to be trustees and acting as such in the defense of the original suit in Missouri, had the right to abandon that trust and make the agreement they claim they did with Garrison, is one also not directly before me. The other question — whether they, for themselves, as stockholders, and professing to represent most of the other stockholders in the company, had the right to make an agreement for their own benefit, such as they set up, and sacrifice the creditors of that company — is also not before me, no matter how questionable such a transaction may have been. Nor have I anything to do with the question, what will be their position if they do ultimately succeed in the superior court? Nor whether the money which they would recover would be held by them as trustees for all the

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stockholders and creditors of the old company, no matter how doubtful that question may be. The sole question before me is, whether the defendants in the present action — the Marie party — should, in equity and good conscience, be allowed to proceed with the action in the superior court before the suit now pending and ready for hearing in Missouri, and which they have instigated and set on foot, has been there disposed of.

After a careful consideration of the whole matter, I am of opinion that the injunction restraining the defendants in this action from proceeding in the superior court should be continued. This court has undoubtedly power to restrain parties from proceeding with actions in other courts of this state, whether they be such as under the former divisions would have been known as actions at law or suits in equity (*Erie Railway Co. agt. Ramsey*, 45 N. Y., 637).

It has frequently exercised this power when parties within its jurisdiction have inequitably and unjustly attempted to prosecute actions in this or other states (*Dinsmore agt. Neresheimer*, 32 Hun, 204; *Conklin agt. Secor Sewing Machine Co.*, 55 How. Pr., 209; *Vail agt. Knapp*, 49 Barb., 302; *Clafin agt. Hamlin*, 62 How., 284; *Reinach agt. Meyer*, Id., 283).

The general rule applicable to cases of this character is clearly and concisely stated by DANIELS, J., in *Dinsmore agt. Neresheimer*, above cited, as follows: "It is the province of a court of equity to prevent one party from taking an unconscionable advantage of another; and when that may be attempted, to interpose and restrain the success of the act by means of an injunction; and when that advantage is sought through the instrumentality of a legal action to restrain its prosecution, to subordinate the controversy to the control and determination of equitable principles."

It seems to me that the rule thus laid down is decisive of the present motion. It is not fair or equitable that Garrison should be subjected to the great expense and trouble of two

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suits, and to the possible risk of a double loss, as he might be if the suit in the superior court is prosecuted to judgment before the trial of the suit in Missouri. The two suits are based upon utterly inconsistent and contradictory claims; and as, so far as I can judge from the papers before me, the Marie party elected in the first instance to rescind their alleged contract with Garrison, they should be required to go on with the suit grounded upon that election. They chose to prosecute Garrison in that suit, and to endeavor to get back the railroad. In the action in the superior court they seek to recover from him over \$5,000,000, because he does not deliver to them 36,000 shares of stock in the new company, to which the same railroad was conveyed, and the value of which stock would depend entirely upon Garrison's having and retaining this very railroad.

I cannot conceive of legal proceedings more inconsistent and contradictory than these, nor of a clearer case for the interposition of a court of equity to prevent injustice and wrong. It is not possible on the papers before me to determine what are the actual merits of the controversy between Garrison and the Marie party. But Garrison's side of the story differs from that of his opponents. He claims, as the papers show, that the whole affair on the part of the Marie party was a speculation. That he (Garrison) with others similarly situated, was trying to get his money by a foreclosure, but the Marie party threatened to attack his bonds, which he had bought in the market, and with the issuance of which he claims he had nothing to do, unless he made terms with them. That the whole stock of the old company was about 70,000 shares, which was then of little value. That he agreed to do certain things, provided he should buy the road at the foreclosure sale; but that he never agreed to buy it absolutely. That the Marie party had an arrangement with him for their own benefit, at the expense of the other stockholders and unsecured creditors, although they represented to the court that they were a committee acting for all the stockholders;

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that they purchased a large portion of the 36,000 shares controlled by them after they had made their arrangement with Garrison; that he tried in good faith to buy the road at the foreclosure sale, and bid more by \$500,000 than he had intended to, but that he was outbid. That this failure to buy at the sale released him from all legal and moral obligations to carry out his arrangements with the Marie party, and that his subsequent purchase of the road was a matter with which they had no concern, and was made on such terms that it was not possible for him to treat further with the Marie party.

The merits of this defense on Garrison's part must, of course, be decided elsewhere, but, for the purposes of this motion, it cannot be assumed by me that Garrison's defense is all false, and that the allegations of the plaintiffs in the original suits are all correct. It would seem from the position taken by the Marie party, they consider that Garrison has no rights which a court of justice should respect. They seek, first, to recover a judgment in the superior court against Garrison of over \$5,000,000 based upon an investment by them, as claimed by Garrison, to have been a comparatively insignificant sum. Second. In the Missouri suit to take the railroad away from Garrison and the company to which he sold it, and to have Garrison's \$1,800,000 of bonds declared worthless. Third. To leave Garrison to make his peace with the company to which he sold the road as best he can. It seems to me that if the nature of the controversy involved ought to have any influence whatever on the decision of this motion, the foregoing brief summary sufficiently indicates that Garrison at least should have a fair opportunity to save himself from the wrong which two inconsistent claims might bring upon him, unless he can secure the relief sought in this action.

The objection is taken by the counsel for the defendants in this action that Garrison ought to make a motion in the superior court for a stay there. It seems to me that this objection has no force. The granting or denying such a motion rests absolutely in the discretion of the court to which

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it is addressed, and if that court should happen to decline to exercise that discretion in Garrison's favor he would be remediless. It would not seem that an order denying such motion would be appealable even. But the right to equitable relief in a proper case is just as absolute as a right to a money judgment in a good cause of action in an action at law. In my opinion, Garrison makes out such a case, and he has an absolute right to the relief which a court of equity only can give in an independent action. The cases in which it is held that an equitable defense to an action at law must be set up in that action and not made the subject of a separate suit do not apply. For, as already stated, the facts which he alleges as a cause of action in this suit have been decided by the referee not to be a bar in that suit. And assuming that decision to be correct, all he seeks here is to restrain the trial of that action until the action in Missouri is disposed of.

The power of a court of equity to restrain the trial of any action perpetually in a proper case cannot be disputed. But it is claimed that it cannot restrain such trial temporarily, until another action has been tried or the happening of some other event. But it has been expressly decided by the court of appeals that a court of equity can, and in a proper case should, exercise this very power, through the instrumentality of an independent suit (*Third Ave. R. R. Co. agt. Mayor, &c.*, 54 *N. Y.*, 159). In that case the court restrained the prosecution of certain actions until one of a class should have been tried, on the ground that the party ought not to be put to the expense and trouble of defending a great number of actions. And if that reason was a good one in that case, it certainly is in this. In *Cushman agt. Leland* (93 *N. Y.*, 652) and *Vail agt. Knapp* (49 *Barb.*, 299) similar relief was given.

I do not see how the superior court could give Garrison the relief to which he is entitled upon a mere motion in the suit now pending there for a stay of proceedings. Even under the present practice a defendant cannot obtain an injunction

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except in aid of a counter-claim set up in his answer. Of course Garrison might have commenced this present action in the superior court, and in that action have sought the relief which he is seeking here. But he could not by a mere motion for a stay of proceedings in the suit now pending in that court invoke the aid of the equitable powers which that court possesses. Now the facts which are set up as a cause of action in the present suit did not appear in the complaint in the action in the superior court suit. They were pleaded in the answer as a bar, and on an application for a stay before the trial the court might have denied it upon the ground that when proved they would constitute a complete defense to the action, although the referee has since held that they are not a bar. Besides, on a motion for a stay, the court would not undertake upon *ex parte* affidavits to determine whether the facts now set up here as a cause of action were or were not true. It is only since these facts have been brought out and established on the trial before the referee, and the referee has held that they are not an absolute bar, that Garrison is in a position to avail himself of those facts in asking that the trial in the superior court be delayed until the Missouri suit has been disposed of, and it seems to me that the only way in which he can so avail himself of these facts is by doing just what has been done, namely, setting them up as a cause of action in an independent suit asking a temporary injunction, and that if he proves them on the trial he should have a judgment, as a matter of right, staying the trial of the action in the superior court until the final disposition of the suit in Missouri.

Motion granted.

WEEKLY PART.

SUPREME COURT.

James Thomas, plaintiff, vs. Ezra Frost, respondent.

Supreme Court, 1st Term of the Session, ending 1884.

There was a verdict for the plaintiff of forty-four dollars and nine cents, and judgment was entered for that sum, the defendant being entitled to costs. Another judgment was entered for seventy-four dollars and ninety-four cents in his favor. The judgment in favor of the plaintiff, and a summary judgment was entered in favor of the defendant for the balance of the costs in the action.

On the day of the trial the defendant moved in this action, where proper, that the judgment be set aside and that based upon the verdict, and in such case the costs and the sum of set-off be against the larger of the sums of the two judgments entered, and the judgment be set aside for the balance of the costs in favor of the party entitled to it. This motion was granted, and the action was superior to the lien of the judgment entered in the action.

Argued by the plaintiff, James Thomas, January, 1885.

By the defendant, James Frost and Lewis, Jr.

Argument was made in this court setting aside judgments entered in favor of the parties respectively, and entering judgment to be entered for the balance of the two judgments.

James Thomas, plaintiff, for appellant.

Ezra Frost, for respondent.

BRADY, J.—The plaintiff had a verdict for forty-four dollars and nine cents, and judgment was entered for that sum. The defendant was entitled to costs and another judgment was entered for seventy-four dollars and ninety-four cents costs in his favor.

On defendant's motion an order was made setting aside both judgments and directing entry of one judgment for the residue of costs, after deducting the amount of the verdict.

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The judgment in favor of the plaintiff, after its entry, and before the judgment was entered in favor of the defendant, was, by the plaintiff, assigned to his attorneys in the action in consideration of their services as such attorneys.

The plaintiff's counsel contend that the assignees of the judgment are entitled to protection, and that the judgment cannot, on motion, be set-off, or the amount of it applied in satisfaction *pro tanto* of the defendant's costs.

It is well settled that a judgment in one action cannot, by motion, be set off against a judgment in another action, or against a third person who is a *bona fide* assignee of the latter judgment (*Perry* agt. *Chester*, 53 *N. Y.*, 240; *Prouty* agt. *Swift*, 10 *Hun*, 232; *Roberts* agt. *Carter*, 38 *N. Y.*, 107). The counsel for the plaintiff seek to apply that rule to this case, and with that view assert that the judgment was assigned before the defendant's judgment was entered, and therefore no right to set off accrued to the defendant before the assignment was made (*Firmenich* agt. *Bovee*, 1 *Hun*, 532).

If the motion here was to set off judgments in two actions, there would be no difficulty in supporting the position on the part of the plaintiff (*Ennis* agt. *Curry*, 22 *Hun*, 584; *S. C.* 61 *How.*, 1). But this is not that case, there were two judgments entered in this action when, properly, there could be only one, and that based upon the verdict (*Bunnell* agt. *Griffin*, 8 *Abb.*, 39). And in such case the lesser amount should be set off as against the larger of the sums to which the respective parties are entitled, and the judgment be effectual for the difference in favor of the party entitled to it (*Code Civil Pro.*, sec. 3234; *Johnson* agt. *Farrell*, 10 *Abb.*, 384). This right is one of the incidents of the action which is superior to the lien of the attorneys or to the effect of an assignment. It is the right of either party to the action to have the result represented by the difference and to thus make or receive payment to the extent of the smaller of the two amounts which may be awarded to them respectively in the action. This rule the law applies to actions and is not dis-

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turbed by the Code. The provisions of the Revised Statutes (2 R. S., 354, sec. 18) relating to set offs had relation to actions for that purpose where a different rule, to some extent, prevailed than that when sought by motion (*Ennis agt. Curry*, 22 Hun, 584).

We think the court below properly disposed of the motion. The order should be affirmed.

BARKER, HAIGHT, and LEWIS, JJ., concur.

COURT OF SESSIONS.

THE PEOPLE agt. HENRY S. CHURCH.

Penal Code, sections 528, 470 — A public officer may be indicted for larceny under section 528.

To convict of a crime for violation of official duty it is not necessary to prove that the accused is a *de jure* officer, if he holds the office *de facto* it is enough.

Section 528 of the Penal Code covers a case of an appropriation by the chamberlain of a city to his own use of public moneys in his hands, and the indictment therefor need not be found under section 470, or the provisions of a city charter.

There may be more crimes than one in a single transaction, and where the illegal act offends against two or more statutes a prosecution under any one of them is proper.

Rensselaer county, March, 1885.

Before JOHN C. NOTT, County Judge and Associates.

THE defendant was placed on trial upon an indictment which charged that "the said Henry S. Church on the 4th day of February, 1884, at the city of Troy in this county was a public officer, to wit, chamberlain of the city of Troy (the city of Troy then and there being a municipal corporation duly organized under the laws of this state) having theretofore been duly appointed as such chamberlain, and having

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qualified as such and entered upon the discharge of the duties of said office. That as such chamberlain the said Henry S. Church was intrusted to receive all state, county and city taxes and assessments, taxed or assessed upon real or personal estate in said city of Troy, also to collect and receive all claims due the city of Troy from any other source, and being so intrusted as aforesaid, the said Henry S. Church, by virtue of his said office of chamberlain of the city of Troy, then and there did receive and take into his possession divers amounts of money being in payment of certain state, county and city taxes and assessments that had been taxed or assessed upon real and personal estate in said city of Troy, and of claims due the city of Troy from other sources, exceeding in value and amount the sum of \$6,000 (a more accurate description of which cannot now be given) for and on account of the city of Troy, as chamberlain or treasurer of said city. That the said Henry S. Church, on the day and year last aforesaid, at the city and county aforesaid, fraudulently and feloniously did take, make away with and secrete, with intent to deprive the true owner of said money, to wit, the city of Troy, of the use and benefit thereof and to convert and appropriate the same to his own use without the consent of the said city of Troy, and did fraudulently and feloniously convert and appropriate to his own use divers promissory notes for the payment of money, the same being then and there due and unsatisfied, and of a kind known as United States treasury notes, of a number and denomination to the said grand jury unknown, and a more accurate description of which cannot now be given, of the value of \$6,000. Divers promissory notes for the payment of money, the same being then and there due and unsatisfied, and of a kind known as national bank notes, of a number and denomination to the said grand jury unknown, and a more accurate description of which cannot now be given, of the value of \$6,000. Of the goods, chattels, personal property and money of the city of Troy which had come into his possession and under his control by virtue of his being such public officer, to wit,

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chamberlain of the city of Troy as aforesaid, against the form of the statute in such case made and provided, and against the peace of the people of the state of New York and their dignity."

Warren, Patterson & Gamble, for defendant, urged the following points :

I. That it must appear from the evidence that the defendant was chamberlain of the city of Troy *de jure*; that he was *de facto* is not enough.

II. That it was improper to indict the defendant under section 528 of the Penal Code, that the indictment should have been if at all under section 470.

III. That the offense of converting public moneys by the chamberlain was provided for by the charter of the city of Troy, passed March 23, 1872 (*chap. 129, Laws of 1872, p. 304, sec. 20*); and this act being special and passed before the Penal Code went into effect under section 725 of the Penal Code stands unrepealed, and the indictment should have been based on that statute.

Samuel Hand and *La Mott W. Rhodes*, district-attorney, for people.

Norr, county judge, in overruling these points, said, whether the defendant was chamberlain *de jure* or *de facto* was unimportant. He was liable to indictment if he assumed to perform the duties of the office under color of title. Bishop says: "In the actual affairs of government a man sometimes holds an office to which he has not been duly appointed. But if he does the duties of it under color of title, he is called an officer *de facto*, and his official acts are binding on third persons though they are said not to be valid in his own favor. One duly appointed and commissioned, serving in the office, is called an officer *de jure*. Now, clearly, an officer *de facto* indicted for malfeasance in office cannot object that he is not such *de jure*, because his acting in the office estops him to deny his right to it. And he is an officer liable to punish-

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ment within the statute against embezzlement (1 *Bish. on Crim. Law*, sec. 464 [*7th ed.*], and numerous cases cited; also, 2 *Bish. on Crim. Law*, sec. 392).

With respect to the other points the judge said he thought the district attorney might have framed the indictment under either section 470 or section 528. An illegal act frequently offends against the provisions of two or more statutes, and a prosecution under any one of them is proper (*Com. agt. McConnell*, 11 *Gray*, 204; *Com. agt. Trickey*, 13 *Allen*, 559; 1 *Bish. on Crim. Law* [*7th ed.*], 778). There is, however, a marked distinction between the two sections. Under section 528 the important element of the offense consists in "the intent to deprive or defraud the true owner of his property," which is distinctly alleged in the pending indictment. Section 470 does not require any such intent to exist in the mind of the defaulting official when he is appropriating public moneys intrusted to him. More must be proven against the defendant to convict him under the pending indictment, than if on trial for an offense under section 470.

It was not necessary to follow the charter of the city as it could not have been intended to have it interfere with the general statute of the state, and full effect may be given to the charter provision without trenching upon the statute, making certain acts, like the present charge of the city chamberlain, felony.

The case was given to the jury — there was a disagreement.

Nichols agt. MacLean.

COURT OF APPEALS.

NICHOLS, administratrix &c., respondent agt. MACLEAN,
appellant.

Appeal — Undertaking — Incorporated guaranty company not alone sufficient to execute undertaking on appeal — Code of Civil Procedure, sec. 1334, 1885.

An undertaking on appeal to the court of appeals must be executed by at least two sureties; the appellant cannot himself be one of the sureties, nor can the approval by a judge of a guaranty company under chapter 486, Laws of 1881, take the place of the two sureties. This reverses the judgment of the general term, rendered in *Hurl agt. Hannibal and St. Joseph R. R. Co.* (87 How., 516).

An undertaking executed only by the appellant and the Fidelity and Casualty Company, with no other surety, is insufficient.

An appellant is only required to file the return and serve the printed case. The respondent, if he wishes to expedite the case, can himself put it upon the calendar and notice it for argument.

Decided, January 27, 1885.

THIS was a motion to dismiss an appeal on the ground of the insufficiency of the undertaking filed, and also for want of prosecution. The undertaking was executed only by the appellant and an indemnity company, with no other sureties.

John D. Townsend, for motion.

Edward W. Crittenden, opposed.

RAPALLO, J. — The Code of Civil Procedure, section 1334, requires that an undertaking on appeal to this court be executed by at least two sureties. The appellant cannot himself sign as a surety (*Morse agt. Hasbrouck*, 10 Abb. N. C., 407).

The act of 1881 (*chap.* 486) does not repeal section 1334 of the Code, and is not inconsistent with it. That act applies only to bonds or undertakings which are to be accepted or approved by a head of department, surrogate, judge, sheriff,

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district attorney or other officer, and it merely authorizes any officer who is required to approve any such bond or undertaking to accept and approve the same in his discretion when its conditions are guaranteed by a duly incorporated guaranty company.

The undertaking on appeal in this case is not one whose sufficiency is made to depend upon the approval of any judge or officer. On the contrary, it does not even require approval (*Code, sec. 1335*), and the approval of a judge cannot be substituted for the two sureties required by law. If it could then the act of 1881 would be applicable and would authorize the judge to give the approval; but there is no law which declares either the approval of a judge or the guaranty by a corporation equivalent to two sureties. We therefore conclude that the undertaking before us being executed only by the appellant and the Fidelity and Casualty Company, with no other surety, is insufficient.

The second ground upon which the motion to dismiss is founded (*viz.*, want of prosecution) is untenable. The appellant is bound only to file the return and serve the printed cases. The respondent, if he wishes to expedite the case, can himself put it upon the calendar and give notice of argument.

The motion to dismiss the appeal should be granted, unless within thirty days the appellant files a proper undertaking and pays the costs of this motion.

All concur.

Boelger agt. Swivel.

CITY COURT OF NEW YORK.

FERDINAND BOELGER, respondent, agt. JACOB SWIVEL,
appellant.

Practice — Supplementary proceedings — When defendant should be allowed his costs and disbursements — Code of Civil Procedure, sections 2447, 2456.

In proceedings supplementary to execution, after examination, a motion was made to compel defendant to pay \$315 to a receiver theretofore regularly appointed, which sum plaintiff claimed defendant was entitled to receive from a third party, and which defendant claimed to have disposed of by delivering to his attorney before service of the second order. An order was made referring this question of fact to a referee, who took testimony and made his report in substance that defendant's claim was true, which report was confirmed:

Held, that under section 2456 of the Code the justice properly allowed defendant his costs and disbursements and charged plaintiff therewith.

Held, also, that a provision in said order that defendant first pay the fees of the referee and stenographer amounted in effect to a direction that said judgment be satisfied *pro tanto*, and in this said order was without authority of law, and that under section 2447 of the Code the justice was vested only with power to direct the application of any money or property in the possession or under the control of the defendant belonging to him to a sheriff designated in the order or to a receiver, if one was appointed.

General Term, March, 1885.

Before HAWES, HALL and BROWNE, JJ.

APPEAL from an order made at special term directing the defendant to pay the disbursements of a reference to ascertain the facts relative to an alleged disposal of money due to the defendant after the service of an order upon him in proceedings supplementary to execution.

A. Walker Otis, for respondent.

D. W. C. Brown, for appellant.

BROWNE, J. — The facts disclosed establish a judgment recovered against the defendant in favor of the plaintiff for

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\$619.83, on September 7, 1882, in this court; a return of the execution thereon unsatisfied; an order thereon to examine the defendant as judgment debtor; the appointment of George E. Hyatt as receiver of the defendant. I infer that a second order for defendant's examination in supplementary proceedings was granted and served upon him on April 10, 1884. Upon that order a motion was thereafter regularly made by plaintiff to compel the defendant to pay \$215 to the receiver, which plaintiff claimed the defendant was entitled to receive from the New York Cafe Company, and which he, the defendant, pretended to have disposed of by delivering to his attorney, for prior services, a check of the company dated April eighth. Upon that motion the defendant and his attorney declared the check was in truth and fact passed to the attorney on the eighth of April, and that it had not been in the possession or under the control of the defendant since that date; an order was made referring two questions of fact involving the truth of the claim of the defendant relative to the transfer of the check to George C. Lay, esq., to take testimony and report his opinion thereon; the testimony was taken, and the referee, a careful and competent lawyer, reported, in substance, that the defendant's claim was true; that he parted with the check on April 8, 1884, to his attorney in good faith; the testimony was taken by a stenographer, and was voluminous; the referee's report was confirmed, and the defendant allowed his costs, but in the same order he was required to pay the fees of the referee and stenographer, and his own witnesses' fees, and, upon such payment, credit was to be given therefor upon the judgment above mentioned.

It is fair to assume that the learned justice in making the order of reference was moved thereto by the charge of plaintiff that he would, upon a reference, establish that the defendant disobeyed the injunction contained in the order. The plaintiff having failed, however, to establish the charge of disobedience, and also failed in discovering any money or

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other property applicable to the judgment, the justice, upon the motion to confirm the referee's report, properly allowed to the defendant his costs and disbursements in the proceeding, and charged the plaintiff therewith. This he was authorized to do (*Code, sec. 2456*). This seems to be the practical interpretation of the order, from the fact that it directs that credit be given to the defendant upon the plaintiff's judgment for the sum thus paid. But the order, in its direction to the defendant to first pay the fees of the referee and stenographer, in effect directed that the judgment be satisfied *pro tanto*. In this I think the order is without authority of law. The judge is vested with the power to direct the application of any money or property in the possession or under the control of the defendant belonging to him, or property belonging to him under the control of a third person, to a sheriff designated in the order, or to a receiver if one has been appointed (*Code, sec. 2447*). This section of the Code predicates the right to make the order of application of money or property to the satisfaction of a judgment upon the discovery of such property from the examination or testimony taken in the special proceeding, founded upon the order of examination; and such order should not be made unless it clearly appears that when the order was served the judgment debtor had the property in his possession or under his control (*Winters agt. McCarthy, 2 Abb. N. C., 357; Peters agt. Kerr, 22 How., 3; Hall agt. McMahon, 10 Abb., 103*).

It appears in this case that the defendant did not have the property sought to be specifically applied to the satisfaction of the judgment; and it does not appear that he had any other money or property which could be applied either to the payment of the judgment or the costs of the special proceeding. There was, therefore, no authority to direct the application provided in the order appealed from.

It seems now that where an order is made for the application of property or money, discovered in supplementary proceedings, in satisfaction of a judgment, the order should

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require the delivery thereof to a sheriff or a receiver, if one has been appointed (*Code, sec. 2447, supra*). The former Code (*sec. 297*) gave the judge a discretion as to the manner in which the discovered property should be applied to the satisfaction of the judgment. Under the present Code, the discretion to make the order is preserved, but, when made, it is mandatory as to the manner in which such property is to be applied to the purpose designated in the order. The language of that portion of section 2447 is: "The judge may * * * make an order directing the judgment debtor, or other person, immediately to pay the money or deliver the articles of personal property to a sheriff designated in the order, unless a receiver has been appointed, * * * in that case to the receiver."

The provision of the article of the Code embracing this subject is barren of language which would warrant an interpretation conferring upon the judge the power to order the payment of the money or the delivery of the property directly to the judgment creditor, or in any other mode than above prescribed. This view is strengthened by reference to the subsequent section (2448), which points out with unerring certainty the duty and liability of the sheriff who receives the property under the order, irrespective of whether there is an execution in his hands or otherwise. The section following (2449) empowers a judge to direct the application of the money or property by payment to the receiver, in cases where one is appointed, or a receivership extended after the receipt by the sheriff of the money or property; or the judge, in his discretion, may direct application to be made directly upon an execution in the hands of the sheriff which had been issued either before or after the making of the order of delivery to him of the money or property. It will be observed that the Code has provided a complete and comprehensive scheme for the application of money or property discovered under supplementary proceedings, and any material deviation therefrom would be unauthorized. Hence, a direction of application by

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payment of money or delivery of property directly to a judgment creditor would be without the sanction of the above provision of the Code.

It follows that the order is erroneous for the reason that the manner of application does not conform to the law. It may be said, however, that the judge had the power under section 2284 to impose the payment of the costs in the manner directed as a punishment for a contempt. There is no doubt of the power of the judge, under the above section, to make direct application to a party aggrieved, of any fine imposed, upon a determination that the party fined was guilty of a contempt. In this case the determination was the other way, so that this section has no application to the present case.

Nor can it be urged because the referee's fees were paid on behalf of the defendant, that was such a discovery of property as would authorize the making of the order. It was shown that the fees were paid by the defendant's attorney, with his own funds. It was not money owned, controlled, or in the possession of the defendant.

No part of the order as directs the payment by the defendant of the fees of the referee, stenographer and witnesses on the reference, and that the same be credited upon the judgment against him if reversed; and it is ordered that the order appealed from be modified by directing that those fees be paid by the plaintiff. Costs of appeal to appellant.

Hawes and Hahn, JJ., concur.

Milligan agt. Goddard.

SUPREME COURT.

ALICE E. MILLIGAN agt. GEORGE E. GODDARD.

Insurance (life) — Forfeiture of certificates — Effect of.

Though a life insurance company may reinstate a certificate of membership after it has been forfeited, so far as its own rights were affected, yet where the holders of other certificates have been benefited by such forfeiture, by the very terms of the certificate itself, the company cannot, without their consent, deprive them of the benefits thus accruing by the terms of their contract.

Special Term, April, 1885.

THE defendant, the Mutual Trust Fund Life Association, issued to one C. D. Milligan a certificate of membership, whereby they agreed, upon the death of said Milligan during the continuance of the membership, to pay the sum of \$3,000 equally (share and share alike) to Alice E. Milligan (wife) as one party, and to the survivors of his friends, George E. Goddard, Thomas J. Tuomey, H. J. Stemler, Thomas Gorey, Thomas Kelly, Charles C. Pettus, F. Sheffield, John F. Souther and G. Centre, who shall have kept their certificates Nos. 368, 369, 370, 371, 372, 374, 375, 377 and 383 in this department in force until his death, provided that if said C. D. Milligan should survive them, then the benefit is to be paid Alice E. Milligan (wife). The persons named as holders of certificates were the holders of certificates with similar conditions to those mentioned in Milligan's certificate, and made payable in the same way. There was a provision in these certificates that if assessments were not paid when due that then the certificate should be null and void, and all payments made thereon should be forfeited to the association. All the persons holding other certificates made default in these payments, some of which were waived by the association, and in some cases the membership was never revived. Milligan having died, his widow claims the whole of the insurance money upon the ground

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that none of the other certificates had been kept in force until the death of her husband, and has filed this bill to determine the respective rights of the parties.

Herman Aaron, for plaintiff.

J. Adolphus Kamping, for defendant.

VAN BRUNT, *J.*—Although the association may have had the power to waive defaults as far as its own rights were affected, it is difficult to see how, if such waiver affected other parties to its contracts, it could dispose of their rights. By a clause in the policy or certificate it became null and void in case of default in making payments. It was this clause which was undoubtedly referred to in these policies where payments are to be made upon death only to those who have kept their certificates in force, and the moment the event happened by which a certificate became null and void an additional right vested in the other beneficiaries, under the certificate of which they could not be divested without their consent. The case is one which differs widely from those where the insurance company and the assured are the only contracting parties.

In the case at bar, each one of the holders of these certificates named in the certificate is a party to it; has rights under it which cannot be taken away without his consent. It may be all very well for the association to reinstate a certificate after it has been forfeited, but as the holders of other certificates have been benefited by such forfeitures by the very terms of the certificate itself, the association cannot, without their consent, deprive them of the benefits thus accruing by the terms of their contract. Such being the case, the reinstatement of these certificates by the company after they had ceased to exist in no way prejudiced rights under the certificates in question. These parties may have valid policies as against the company, but the moment they allowed their certificates to lapse, they lost all rights under the certificate in question, which could be reinstated only by the consent of

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the beneficiaries under the certificate, whose rights were to be affected by such reinstatement, as well as by the assent of the association issuing the certificate. No such assent having been given in this case at bar, the holders of the other certificates lost their rights under the certificate in question, and cannot now claim any portion of the proceeds of the same.

Judgment for plaintiff.

SURROGATE'S COURT.

In the Estate of MORGAN L. SAVAGE, deceased.

Will — Interest on legacies, when begins to run.

A testator directed that a certain legacy should be paid "as soon as practicable," after his death. By a later article of his will he made a trust provision in favor of another beneficiary, directing that such trust be established "as soon as possible," after his death, and that interest beginning at his death, be paid to the beneficiary; but he provided that such trust should not be set up until after the payment of the legacy first referred to.

Held, that upon such legacy interest did not begin to run until a year after the death of the testator.

New York county, March, 1885.

ROLLINS, S. — I am asked to determine from what period interest should be computed upon a certain legacy bequeathed by the will of this testator to his daughter, Mrs. Vernet. It is not claimed by counsel for the legatee that there is any feature in this case which takes it out of the operation of the general rule that interest does not begin to run on a legacy until a year after the death of the testator, unless he has given by his will an express or implied direction for an earlier payment of such interest, or of the legacy itself. But it is insisted that such a direction has here been given, and that because of it Mrs. Vernet is entitled to interest from her father's death. The only direction immediately associated

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with the bequest is that the executors shall pay it "as soon as practicable" after testator's death. Now, have these quoted words any real importance? It is the policy of our law that legacies shall not ordinarily be paid until a year from the testator's death. And in this State, and in other localities where the same policy prevails, it has been held that such words as are here relied upon cannot be regarded as a direction that that policy be departed from.

Said chancellor ELDON, in *Gibson* agt. *Bott* (7 Vesey, 89), commenting upon the words "as soon as conveniently may be:" "Where those words occur as to legacies, interest is never given until the end of the year. The court is obliged to take the general rule, as it is impossible to make the inquiry in every particular case. Suppose a testator directed his executor to convert the property with all convenient speed to pay certain legacies, and then gave the interest of the residue for life, remainder over, the legatee could make no complaint until the end of the year."

In the earlier case of *Sitwell* agt. *Bernard* (6 Vesey, 540), the same chancellor, in commenting upon the inequalities attending the application of this doctrine said: "Upon the principle that the inquiry as to the condition of the personal estate, when each and every part could be got in and made productive, is endless and immeasurable, the court cuts the knot by doing what in general cases is convenient, though in particular cases both convenience and justice may be disappointed."

Benson agt. *Maude* (*Madd. & Geld.*, 15) was a case in which a testator had directed his executors to set up a certain trust "as soon as they should think proper." In the opinion of the vice chancellor this direction "amounted to the same thing as a direction to raise and pay a legacy as soon as the executors should find it convenient; and, as the court had adopted a year as the rule of convenience, the legacy could not be raised until the end of the year."

In the cases cited below it was held that the legatee was not

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entitled to interest for the first year, though there was in each of them a testamentary direction substantially like that in the case at bar, and, in some instances, even more stringent in its terms (*Williamson* agt. *Williamson*, 6 *Paige*, 299; *Hoagland* agt. *Schenck's executors*, 16 *N. J. Law*, 377; *Kent* agt. *Dunham*, 106 *Mass.*, 586; *Rogers* agt. *Rogers*, 2 *Redf.*, 24; *Bradner* agt. *Faulkner*, 12 *N. Y.*, 472; *Kerr* agt. *Dougherty*, 17 *Hun*, 341; *Sullivan* agt. *Winthrop*, 1 *Sumner*, 1; *Webster* agt. *Hale*, 8 *Ves.*, 410).

These cases must be taken as decisive of the present contention, unless the claim of the legatee finds support in some clauses of the will that have not yet been considered. It does not. The testator gives instructions regarding the payment of certain other beneficiaries in terms similar to those which he adopts in his bequest to Mrs. Vernet, and by a later provision he directs that "after the payment" of certain legacies, including the one to Mrs. Vernet, and "as soon as possible" after his decease, his executors shall invest the sum of \$20,000, and pay to his wife during her life the interest and income, "commencing," as he says, "from my decease."

It is argued that the testator's use of the phrase "as soon as possible," indicates his wish that the \$20,000 trust should be speedily set up, and that therefore the direction that it should not be established until *after* the payment of Mrs. Vernet's legacy implies an emphatic wish that that legacy should be discharged at once. At first blush there seems to be some force in this suggestion; but on more careful consideration it will appear that this clause opposes more than it assists the contention of the legatee — for by it the testator explicitly declares that his wife shall receive interest from his death on the \$20,000, and by one of the earlier clauses of his will he provides that his wife shall be paid \$500 "immediately" after his death. Those express and positive directions enhance the significance of his failure to give special direction respecting interest on Mrs. Vernet's legacy, and make it plain that

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his injunction to his executors to discharge that legacy as soon as practicable did not call upon them to do so until after the lapse of a year.

Decree accordingly.

N. Y. SUPERIOR COURT.

LUCY E. WHITE agt. JANE M. KANE.

Will—Widow's title to real estate by devise though charged with the debts of testator—When she can give good title unincumbered by such debts—Code of Civil Procedure, section 2750.

A devise was as follows: "After all my lawful debts are paid and discharged, I give, devise and bequeath all my estate, real, personal or mixed, to my wife L. E. W."

Held, that though the real estate stands charged with the debts of the testator, yet as the charge is general, the devisee, after the expiration of the statutory lien of three years, can give a good title to purchasers unincumbered by such debts.

The widow was made sole executrix, but there was no mention of dower in the will.

Held, that the assertion of her right to dower in the account filed by her before the surrogate cannot be construed into an election to take her dower in the place of the devise.

General Term, March, 1885.

Before SEDGWICK, C. J., VAN VORST and FREEDMAN, JJ.

Eliel F. Hall, for plaintiff.

Weeks & Forster, for defendant.

BY THE COURT (VAN VORST, J.)—This case was submitted to the general term, on a statement of facts agreed to by the parties, and the controversy between them arises under the last will and testament of John H. White, late of the city of New York, deceased. The first clause of the will is in these words: "After all my lawful debts are paid and discharged, I

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give, devise and bequeath all my estate, real, personal or mixed, to my beloved wife, Lucy E. White, for her sole use, benefit and behoof forever." Mrs. White is the sole executrix of the will. She has contracted to sell to the defendant certain real estate, owned by the testator at the time of his decease, of which she claims to be seized through her husband's will. The plaintiff, in pursuance of the contract of sale, tendered to the defendant a deed, such as was required by the agreement, which the defendant refused to accept and fulfill the agreement on his part, on the ground, amongst others, that the lawful debts of her husband had not been paid, and that his estate was insolvent, and the plaintiff had not a title free from incumbrances. The testator died on the 26th of February, 1877. On the 21st day of March, 1877, his will was proved before the surrogate of New York, and on the same day letters testamentary were issued to the plaintiff as executrix. In August, 1879, the executrix filed her accounts and asked for a final settlement, which was accomplished, and a decree made in November, 1879. The contract for the sale of the real estate was made between the plaintiff and defendant on the 14th day of July, 1884, and the deed was tendered and refused in September of that year. By force of the language of the testator's will, above given, his lawful debts were charged upon the real estate devised to his wife. The existence of these debts, however, did not prevent the vesting of the estate in the devisee. Seized of the estate she had the right, as devisee, to convey the land. The gift of the land charged with his debts was made to her individually, and not as executrix. The will did not clothe the executrix with a power of sale. The proceeds realized on the sale of the land she would be entitled to receive, and if the personalty was insufficient to pay the debts, she would be obliged to apply these proceeds of the real estate to the payment of the debts. By the devise to her of the lands, subject to the payment of the debts, she would take and hold such proceeds for the purpose of paying debts, and they

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could be reached in her hands to that end. But the purchaser from the devisee, in good faith, would not be bound to look to it that the moneys were so applied. This has been repeatedly decided in the English courts (*Elliott agt. Merryman, Barnardiston's Ch. R.*, 78). A late case is *Corser agt. Cartwright*, which went to the house of lords (7 *House of Lords Cases*, 731).

There are numerous cases in the courts of this state which bear more or less upon this subject. It is not necessary to refer to any case other than *Reynolds agt. Reynolds*, (16 *N. Y.*, 257), in which the rule is stated in harmony with the English cases, that "where a testator devises real estate, after the payment of debts and legacies, it has been held that the real estate was charged.

Where there is a charge for the payment of debts generally, followed by specific dispositions of real estate, the purchaser is not bound to see to the application of the purchase-money. "The charge is equivalent to a trust, and the same effect will be given to it by a court of equity, as if a direct devise had been made to the trustees for payment of debts" (*Leading Cases in Equity, White & Tudor, note to Elliott agt. Merryman, vol. 1, page 88 [4th Amer. ed.], marg. p. 76*).

The result of the rule in England is that where the debts are charged generally they do not follow the land in the hands of a *bona fide* purchaser, otherwise however where there is a charge of a specific debt or legacy. The reason for the distinction is stated in the cases. The rule is stated in *Perry on Trusts* (vol. 2, sec. 802), and is sustained by the cases, that if a testator "charges payments upon real estate, and then devises it to be held absolutely, the devisee can sell the estate and give valid receipts and discharges for the purchase-money."

But in this state, although the charge be of debts generally, yet the charge becomes and remains a lien on the devised lands and runs with it for the term of three years.

By the Code of Civil Procedure (sec. 2750), it is provided in substance that any time within three years after

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letters granted upon the estate of a decedent, an executor, administrator or a creditor of the decedent may present to the surrogate's court a petition praying for the sale of the decedent's real property for the payment of his debts, &c. The Revised Statutes contain similar provisions.

Hyde agt. Tanner (1 Barb., 75) decides that this creates what is called a statutory lien for three years, running with the land, not only in the hands of the devisees, but in the hands of a purchaser from the devisee. After three years, however, the land is discharged of the lien, and the *bona fide* purchaser takes the same free and discharged from the debts.

In *Slocum agt. English* (62 N. Y., 494), CHURCH, C. J., says: "The object of the statute was to fix a certain period after which *bona fide* purchasers would be protected, and actions might be maintained against heirs and devisees (*Jewett agt. Keenbully*, 16 Barb., 193; *Parkinson agt. Jackson*, 18 Hun, 353). This view was also advanced as late as February, 1884, in *Smith agt. Soper* (32 Hun, 46) in which the general term of the second department says: "The statute is based upon the principle that the purchaser having paid his money in good faith, it devolves upon the creditor to see that it is applied in payment of the debts of the testator, and upon the further principle that the creditors having three years in which to enforce their lien, if they neglect to do it within that time *bona fide* purchasers shall not be prejudiced by such neglect."

In the case before us, when the plaintiff agreed to sell the land to the defendant, more than seven years had elapsed since the probate of the will and the issue of letters testamentary. No delay appears to have been allowed in making and filing an inventory of the personal estate, and in administering it, or in proceeding to a final decree. The executrix seems to have made a full exhibit of the condition of the estate for the guidance of creditors and all concerned.

No action or proceeding of any kind has been commenced

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in the surrogate's court, or in any court, by any person for the sale of the real estate for the payment of the debts.

Upon such state of facts it seems clear to us that the devisee can give a good title unincumbered by the debts of the testator. The statute lien, so called, is at an end. Nor can creditors be prejudiced by the sale of the land. It is in fact a movement in the direction of paying the debts by raising a fund for the purpose. The price agreed to be paid is presumably the full value of the land. The creditors must look to it that the proceeds go to the satisfaction of debts. In no other way than through a sale can the real estate be utilized in favor of creditors.

The objection to the title, therefore, that the real estate is incumbered by the debts of the testator is not well taken. Nor does the objection that the widow was put to her election between the gift to her under the will and her claim of dower furnish any sufficient reason to question the goodness and completion of the conveyance she proposes to make or the title she has tendered. All that remains to her is in substance her claim of dower. The estate is insolvent. The testator presumably knew the condition of his estate and the value of his gift to his wife.

In the proceedings in the surrogate's court upon the settlement of her account as executrix, the plaintiff asserted her claim, "as widow, to her dower out of the proceeds of the real estate when sold." She proposed "to wait until the sale and then have her dower right adjusted."

The will does not declare that the devise was in lieu of dower. And, when the condition of the whole estate is considered, the devise to her is not necessarily, or by implication, inconsistent with her claim of dower, to be adjusted and paid out of the proceeds of the sale.

The claims of creditors must needs be adjusted out of the residue of the property. They will look after that.

The result reached is, that the objections taken by the defendant to the title are not well founded.

Roberts agt. Stuyvesant Safe Deposit Company.

There should be judgment in favor of the plaintiff for a specific performance on the part of the defendant of the contract, with the costs of this action.

SUPREME COURT.

LYDIA J. ROBERTS agt. THE STUYVESANT SAFE DEPOSIT COMPANY.

New trial—When should be allowed on the ground of newly-discovered evidence.

Where, on a motion for a new trial, all the facts sought to be placed before the jury as new evidence might, with proper diligence, have been known to the defendant's attorney, yet the failure of the attorney to set up those facts should not prejudice his client or prevent a new trial if the facts really existed, and are such as should be submitted to the jury on a trial of the case.

Special Term, March, 1885.

DONOHUE, J. — The papers in this case are very voluminous, but on the material facts in the case, it seems to me the questions on this motion lie in a small compass. I think it is clear that, if the facts are as the defendant claims them to be in regard to the evidence that may be given on the new trial, and on amended pleadings setting out the facts claimed to have been newly discovered, there would be at least a very important question to submit to the jury in passing on the facts before the court in the case as originally tried. The ground taken by the plaintiff that the facts were within the knowledge of the attorneys for the defendant may, perhaps, on the papers, be true, but I do not think even a want of information, or want of use of information which the attorney possesses, or any mistake which the attorney would make in that respect, should prejudice the defendant in a case of this character.

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In the case of *Emerick* agt. *Clute*, it was held by the general term that an admission made by the plaintiff's counsel on the trial of a cause which led to its dismissal, when such admission was in fact not correct, that the plaintiff was entitled to a new trial, and that the costs should abide the event. In this case all the facts now sought to be placed before the jury as new evidence may, with proper diligence, have been known to the defendant's attorney. But I think the failure of the attorney to set up those facts should not prejudice his client, if the facts really existed, and are such as should be submitted to the jury on a trial of the case. I do not think that the defendants in this case are charged with such laches in that respect (that is, the officers of the company), that they should be prejudiced by anything that has occurred.

The defendant corporation is peculiarly situated. I do not see that a careful reading of the testimony already in shows any willful act on their part leading to the injury of the plaintiff, and that the verdict against them in the case was found simply on their liability as bailees. While in law and in fact, on the evidence on which the verdict was found, they may well be held for the loss of the property, still no willful act of theirs—but the want of judgment in the acts of others—has led to the loss for which the plaintiff seeks to hold them. The defendants are but trustees of others, and, I think, fairly have the right to have all the facts in detail, as desired, submitted to a jury.

I think there should be a new trial, on terms.

Whitney agt. Page.

SUPREME COURT.

ISRAEL G. WHITNEY agt. JOHN B. PAGE.

*Stock — Assessments paid by seller on stock sold to be delivered at future time —
Right of seller to repayment of such assessments.*

Where shares of stock are sold to be delivered at a future time, and before the delivery the seller, to save it from forfeiture, pays assessments levied upon the stock, he has the right to refuse delivery until repayment of such assessments.

Special Term, March, 1885.

On the 30th of June, 1881, the defendant, John B. Page, entered into certain contracts with one E. R. Wiggin, in the words following:

"Value received, I hereby agree to pay and deliver to E. R. Wiggin, or his order, on demand, fifty shares of the capital stock of the North River Construction Company, said stock having twenty per cent of its par value paid in thereon — that is, twenty dollars per share.

"NEW YORK, June 30, 1881.

"JOHN B. PAGE."

and

"For value received, I hereby agree to pay and deliver to E. R. Wiggin, esq., or his order, fifty shares of the capital stock of the North River Construction Company, said stock having twenty per cent or twenty dollars per share of its par value paid in thereon, said stock to be delivered when said Wiggin surrenders to me certificate for two hundred and thirty-four shares or thereabouts (being the only certificate outstanding in said Wiggin's name) in the Continental Railway and Trust Company, which stock last named has been assigned and sold to me.

"NEW YORK, June 30, 1881.

"JOHN B. PAGE."

 Wagner agt. Page.

Subsequently the said Wagner assigned the said contracts to the plaintiff of which the defendant had no notice until November 11, 1892. Prior to November 11, 1892, there had been additional calls upon said construction company stock, which the defendant paid as the stock would have been forfeited had such calls not been paid. Upon the 11th of November, 1892, the defendant received of the plaintiff the certificate referred to in the second of the above mentioned paragraphs of the shares of the Continental Railway and Trust Company and the plaintiff demanded his construction company stock which the defendant refused to deliver unless the assessments which he had paid were refunded. This the plaintiff refused to do and in May, 1893, brought this action for specific performance.

Elliott E. Smith for plaintiff.

A. E. Pope for defendant.

VAN DUSEN, J.—The main question involved in this case seems to be whether the defendant was justified in the payment of the assessments levied upon the stock, and whether he had a right to demand their repayment before delivering the stock to the plaintiff. If, in the case of *Duffy agt. Donovan* 12 N. E. 434, the law is truly stated (and it is not for me to question it), in equity the defendant held this stock in trust for the plaintiff and as he was bound to protect the title he had no option but to pay, as non-payment would have forfeited the stock. In the case of *Duffy agt. Donovan* the payment of taxes, assessments and interest was allowed by a party who was in default in not delivering possession of property. How much more equitable is it to allow such payments made by a party who is not in default? Such being the case the defendant had the right to demand repayment of assessments paid by him, and if such repayment was refused he was justified in his refusal to deliver.

The complaint must therefore be dismissed, with costs.

Matter of the Application for Probate, &c., of ELIZA B. BECKETT, deceased.

SUPREME COURT.

In the Matter of the Application for Probate of the last Will and Testament of ELIZA B. BECKETT, deceased.

Will — Declaration of — No form of words are necessary — Evidence sufficient to constitute proof of declaration of a will.

To make the declaration required by the statute as to wills no form of words are essential, but what is required is that the witnesses shall be given to understand by words or acts by the decedent that the proposed instrument is intended as a will; the legislature only meant there should be some communication to the witnesses indicating that the testatrix intended to give effect to the paper as her will. Any communication of this idea, or to this effect, will meet the object of the statute.

First Department, General Term, March, 1885.

Before DAVIS, P. J., BRADY and DANIELS, JJ.

APPEAL from a decree of the surrogate of the county of New York rejecting the proposed will.

John L. Cadwalader and C. W. Bangs, for appellants, cited chiefly *Peebles* agt. *Case* (2 *Brad.*, 226); *Rider* agt. *Legg* (51 *Barb.*, 260); *Reeve* agt. *Crosby* (3 *Redf.*, 74); *Chaffee* agt. *Bap. Miss.*, &c. (10 *Paige*, 85); *Auburn Seminary* agt. *Calhoun* (25 *N. Y.*, 422); *Hoysradt* agt. *Kingman* (22 *N. Y.*, 372); *Willis* agt. *Mott* (35 *N. Y.*, 492); *Gilbert* agt. *Know* (52 *N. Y.*, 125); *Coffin* agt. *Coffin* (34 *N. Y.*, 9); *Lewis* agt. *Lewis* (11 *N. Y.*, 224); *Burnett* agt. *Silliman* (16 *Barb.*, 198); *Peck* agt. *Cary* (27 *N. Y.*, 9); *Tarrant* agt. *Ware* (25 *N. Y.*, 425); *Remsen* agt. *Brinckerhoff* (26 *Wend.*, 332); *Thompson* agt. *Stevens* (62 *N. Y.*, 635); *Heath* agt. *Col.* (15 *Hun*, 100); *Moore* agt. *Moore* (2 *Bradf.*, 261.)

E. Ellery Anderson, Joseph S. Auerbach, Richard W. Stevenson and Frederick S. Wait, for respondents, cited chiefly *Seymour* agt. *Van Wyck* (6 *N. Y.*, 120); *Woolley* agt. *Woolley* (95 *N. Y.*, 231); *Mitchell* agt. *Mitchell* (77 *N. Y.*,

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596); *Remsen* agt. *Brinckerhoff* (26 *Wend.*, 324); *Abbey* agt. *Christy* (49 *Barb.*, 276); *Nugent* agt. *Nugent* (2 *Redf.*, 369); *Dodworth* agt. *Crow* (1 *Demarest*, 256); *Ex parte Beers* (2 *Bradf.*, 163); *Robinson* agt. *Smith* (13 *Abb. Pr.*, 359); *Walsh* agt. *Walsh* (4 *Redf.*, 165); *Marx* agt. *McGlynn* (4 *Redf.*, 455).

DANIELS, J.—The instrument presented as the will of the decedent was written by herself. It was dated on the 5th of October, 1881, subscribed by her and by two witnesses who were present at the time of its execution. It was written substantially in form as it has been set forth in the case, and was partially upon two sides of the same paper, the second side including all that was written after the word "in" as it has been set out in the case and the points. It was as follows:

Octo. 5th, '81.

My last will and testament. I leave and bequeath to my niece Alice McBlair all the money I die possessed of in several banks and bonds, besides all I bequeathed to her in my former will.

I leave \$200 to my niece Ellen Laffan to use for a purpose I have explained to her in writing, and which she has promised to attend to faithfully.

In case of the death of Alice I desire all I have left to her to be divided equally between my nieces, excepting \$1,000 for the suffering poor, to the care of Father Doherty, Holy Innocents Church.

Signed in the presence of two witnesses.

ELIZA B. BECKETT.

MARIE DEEN,

104 East Fifty-fourth street.

LOUISE DE CASSINI.

And it was proved by uncontested evidence that decedent intended, prior to the time when this instrument was executed, to make a testamentary disposition of her property in favor of Alice McBlair, the principal legatee, who was her niece.

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The decedent had no children. Alice McBlair was the daughter of her deceased sister, who died when Alice was of about the age of two years. From that time she became a member of the family of the decedent, and continually resided with her until she was taken to Litchfield, in the state of Connecticut, and placed there in an institution for medical treatment. The intervening period was nearly, if not quite, twenty-six years, and during that time the relations between the decedent and Alice were those of mother and daughter. The intimacy and affection of that relation is shown to have existed between them, the decedent having educated Alice and guarded and cared for her with the solicitude and tenderness of a mother, and the latter fully reciprocating the ardent affection of a daughter. Nearly a year before the execution of this controverted instrument, Alice became impaired in her health, and appears from that time to have been a person of unsound mind, and she was placed in the institution at Litchfield to receive medical attention for her disease. The decedent appears to have regarded the dependence of Alice upon her bounty as increased by this circumstance, and on that account concluded to make such a disposition of her property as surely to secure the protection of her adopted daughter during her life. Her deceased husband had previously in his will provided an annuity of \$500 a year for this adopted daughter, and the decedent intended to enlarge the provision made in her behalf as far as that could be done within the limits of her own property and resources. And she was actuated with that intention in drawing and subscribing this instrument. Before doing so she proceeded to Litchfield for the purpose of being near this adopted daughter and understanding her condition and ascertaining the probabilities of her recovery. She remained there upwards of a month after the 13th of August, 1881. Before her departure upon the journey she was during the preceding night at the Grand Union Hotel, in the city of New York. She had with her there Louisa De Cassini, one of the witnesses,

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who was in her service, and a conversation took place between them concerning the future purpose of the decedent in the execution of a will. Her statement, as it was related by the witness, was that "she was going to make a preparation for her daughter. I knew whom she meant. She asked me if I would be willing to sign a paper for her any time that she would ask it of me, and I told her I would. * * * She said in the hotel she was about to make a will, but she did not have me to sign that will." In her cross-examination, referring to the same conversation, the same witness stated: "She told me that she thought a great deal of her daughter, and she said all she had she was going to give to her daughter. She said her daughter was her favorite, and she thought a great deal of her, and nothing was too good for her. She told me she was a very handsome girl. She was sorry and very much grieved that she had to be where she was." At Litchfield this subject was again recurred to, when the witness was told by the decedent "that the case may come into court some day, but that I need not be afraid; nothing would happen to me about it." She further testified: "She said to me she was about going to make a will, but she did not know when." * * And added: She said 'would you be willing to sign that paper for me?' but she did not say the paper or refer to it as a will, but she said, 'would you be willing to sign a paper for me some day?'" The latter statement rendered her evidence somewhat confused as to the character of the paper referred to in the conversation, but both in her direct and cross-examination she stated the fact that the instrument which was to be made and witnessed was mentioned by the decedent as a will. And as that statement was in no manner withdrawn during the course of her examination, it is probable that the last answer referred to was confused in taking down the evidence, and that it should not be regarded as reducing in any respect the force of the preceding statements mentioned to have been made by the decedent that the paper she referred to was to be a will. The other part of the conversation, relat-

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ing her affection for her adopted daughter and her design in her behalf, also indicate her purpose to be to make a testamentary disposition of her property in favor of this niece. These are circumstances to be considered in view of the other evidence relating to what transpired at the time when the paper was subscribed and witnessed. That it was subscribed by the decedent in the presence of the two witnesses admits of no reasonable ground for doubt, although the other witness was not able to testify that she saw the decedent sign her name. She was present before the preceding witness De Cassini was called in, and from the order in which the witnesses subscribed their names probably subscribed before the other witness, and testified that she was quite sure that she saw the signature of the decedent to the paper before her own name was added to it, as a witness, and that her recollection was that the decedent signed the paper before the witness De Cassini came into the room. But as to this fact she was evidently mistaken, for the witness De Cassini was clear and positive in her testimony that the decedent subscribed her name to the paper after she herself entered the room, and that it was done before she was permitted to sign it as a witness. She also thought that Deen subscribed the instrument as a witness after she herself had witnessed it. It is not important, however, to determine the accuracy or inaccuracy of this statement, for the witness Deen did state that "she must have signed it at the time I did," and that she thought she saw the signature when she herself signed as a witness. And the evidence of the other witness is that the decedent signed after she herself went into the room, and she went there while the witness Deen was there. The fact of the subscription of the instrument by the decedent in the presence of the two witnesses was established by this proof. These three persons were the only individuals who were present, and Cassini testified that the decedent stated that she must sign the paper first and sit down and then subscribed it, and after both the witnesses had signed, the decedent folded it up and put it away as a completed instrument.

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The important point to be determined is not as to the subscription of the paper by the decedent in the presence of the witnesses, but as to the fact of her declaring it to be her last will and testament. The statute has required that at the time of making the subscription, or at the time of acknowledging it, the person subscribing the instrument shall declare it to be a last will and testament. No formal declaration of that fact was made by the decedent in the presence of these witnesses, but when the witness Cassini entered the room then occupied by the decedent and the witness Deen, the former said, "there is the paper I spoke to you about signing. I was going to sit down, and she said, 'wait a moment, that she had to write first.' She said, 'are you willing to sign?' I said 'yes.' She said, 'well it may make you come to court, but you need not be afraid, there will be no trouble upon you for it.' Miss Deen was there at that time; she stood up in the room in the middle of the floor." And that statement, in its allusion to the paper, was again repeated by the witness in the course of her cross-examination. But while it was not then mentioned or referred to as a will, the allusion to what she had said to the witness before about signing was sufficient to intelligently inform her that this paper was designed to be her will. She had, in the conversation near the middle of September, stated to the witness that she was about to and intended to make a will, and inquired of her whether she would sign it, and that the witness had promised to do. When her presence was procured on this occasion and the testatrix remarked to her that "there is the paper I spoke to you about signing," she clearly intended to refer to the preceding conversation had between herself and this witness. And as she had mentioned in that conversation that the paper was to be a will when she said "there is the paper I spoke to you about signing," the statement was equivalent to saying to her "there is the will which I mentioned to you I intended to make." That would be the ordinary understanding resulting from this statement and the reference to what had been said before about signing. And

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it was equivalent to a declaration by the decedent that this paper had been drawn and subscribed by her as her will.

To make the declaration required by the statute no form of words are essential, but what is required is that the witnesses shall be given to understand by words or acts by the decedent that the proposed instrument is intended as a will. Upon this subject it was said in *Remsen* agt. *Brinckerhoff* (26 Wend., 325, 332), by the chief justice: "I agree that no form of words will be necessary; that the legislature only meant there should be some communication to the witnesses indicating that the testator intended to give effect to the paper as his will. Any communication of this idea or to this effect will meet the object of the statute." And that was approved in *Gilbert* agt. *Knox* (52 N. Y., 125).

By the conversation which took place, and the reference in it to what had before been said, the fact was indicated and brought to the knowledge of the witness that this paper which was present, and made the subject of the final conversation, was the will which the decedent had previously expressed it to be her design to make in her conversation with this witness at the Grand Union Hotel. And that complied with all that the statute has required for the observance of this ceremonial in the execution of a testamentary instrument.

The evidence of the other witness was still more explicit. She had witnessed preceding wills made by the decedent in 1876, '77 and '80. The will of 1880 was subscribed by this witness and still another person, and as the other, who was the decedent's maid, was turning from the table to leave the room, the decedent inquired of her if she knew what the instrument was, and when she replied that she did not, the decedent said, "it is my last will and testament." That was a formal declaration as to that instrument establishing a complete compliance with this requirement of the statute. And as the witness Deen was also a witness to that instrument, and was present when this declaration was made, she clearly understood the instrument subscribed in 1880 to have been designed

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as the will of the decedent. She was sent for to witness the instrument now in controversy. Upon her arrival she was asked by the decedent to sign this paper, "that she wanted to make alterations in her previous one on account of Miss McBlair's sickness. That was the last one in 1881." * * * "When I came there she wanted me to sign a paper again, that she wanted to make alterations of a previous one on account of Miss McBlair's sickness." * * * "She just simply asked if I would sign that paper on account of Alice's sickness; that she wanted to alter it. She said she was sorry to trouble me again to sign the paper." This paper was lying upon the table at the time, and the witness did subscribe it as has already been stated. She testified further that the decedent did not declare to her, or in her presence, that this was her last will and testament, nor that it was a codicil to her last will and testament. But from her knowledge of the fact that it was made to effect alterations in a preceding will, which she understood and knew to have been a testamentary instrument, and was requested to witness it for that purpose, she had good reason for believing and understanding that this last instrument also was a will, although no formal announcement of that fact was made in her presence. The declaration of the object to be accomplished by it, and of the instrument to be effected, which she knew to be a will, were sufficient to inform her that this was such an instrument, and that she was requested to sign it to add to its formal validity.

And that she did so understand it was finally stated by herself in her evidence. This statement was contained in her answers by which she related the fact that she knew what this paper was, and knew it from the manner in which the decedent spoke and the way in which she acted. Her final answer was, "she spoke of that paper as her will, and she spoke of this being alterations of the other paper, and of course I knew it was her will." To each one of these witnesses, therefore, the decedent communicated the fact in these requests and allusions that the paper they were requested to witness

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was designed by her to be her will. And that complied with all that the statute required to create a valid publication of it as such.

It is true that in and by it the decedent did not propose to make a complete disposition of her estate, but that has not been required to render it legally effective as her will. She did by means of it design to dispose of a portion of her estate. The expression of that design is entirely clear, and the fact that neither the preceding will referred to by her, nor a later one she may have made, has never been found, will not prevent this one from being carried into effect. So far as this instrument was designed to make an independent disposition of her estate, it was lawfully made and required to be carried into execution.

It has been contested on behalf of her two surviving sisters and the children of her deceased brothers and sisters. The resistance to its probate was placed chiefly upon the uncertain character of the evidence tending to establish the declaration by the decedent that the instrument subscribed was her last will and testament. The proof, certainly, was close and critical; but at the same time as it evidently was designed to and did bring the minds of these witnesses to the knowledge of the fact that the decedent intended this instrument to be her will, that was all which the law required to comply with this provision of the statute. The policy of the disposition proposed to be made of the estate is not a subject to be considered by the court. All that can be required is that the statutory formalities shall be proven to have been observed, and that they were is the reasonable import of the evidence given upon the hearing before the surrogate. What the statute had directed was conformed to. The instrument was proved in such a manner as to entitle it to be admitted to probate. This was the legal effect of the evidence produced upon the hearing. It presented no question of fact, but one purely of law, and no further trial of the contest between these parties can therefore be necessary. But the decree of the sur-

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rogate should be reversed and a decree should be entered establishing the instrument proposed as the will of the decedent and directing it to be admitted to probate, with costs to the several parties to be paid out of the estate.

DAVIS, P. J., and BRADY, J., concurred.

CITY COURT OF NEW YORK.

STROUB agt. HENLY.

Arrest — Affidavits — Insufficiency of, to show a valid ground of arrest — Code of Civil Procedure, section 550.

The fact that defendant said that he would not pay the plaintiff, and that he could not get the money, furnishes no ground of arrest, even when coupled with the admitted assertion that he was going to Europe.

Where the only evidence submitted is, that defendant said that he would not pay the plaintiff, that he was going to Europe, and the opinion of plaintiff that he was about to take away all his money and property; a valid ground of arrest is not established.

HAWES, J. — The affidavit of George W. Moore, jr., alleges that he had a conversation with defendant and that he informed him that he was going to Europe. The affidavit of John L. Stroub alleges the causes of action, which appear to be for damages for breach of contract and the balance of a loan, and that defendant told him that he was making preparations to go to Europe. No further information was derived from defendant, so far as appears, as to what he had done or was doing. The going to Europe, taken by itself, furnished no ground of arrest. The witness Stroub, however, alleges "that he has and is about to take with him all his money and property and all the money and property of his wife." Is this an allegation of any fact or circumstance which furnishes the court with information that the defendant intends to do so? It would seem to be a conclusion reached by the plaintiff, but what information has the court of his purpose? He

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furnishes no evidence whatever. There is no statement of the defendant to that effect. He does not refer to any act of the defendant which would justify the conclusion reached. The mere fact that he is going to Europe in company with his wife would give rise to no such inference, and every presumption must be held to be in favor of an honest and not of a dishonest purpose. Besides, there can be no presumption of a fact in regard to which no evidence is offered, and the mere statement of a witness as to a defendant's purpose is valueless as establishing facts which would justify an inference of fraud. There is no evidence that he had any money or property, or that it was of any value. Can I hold on such a statement that a fraudulent intent to cheat has been established, especially in view of the fact that the plaintiff's statements, although admitted to be true, are to be most strictly construed against him? This is the only vital allegation in the moving papers, and if I was convinced that the fact that he was about to take all his property to Europe was established by legal proof, I should feel justified in holding this order, but I cannot deem the plaintiff's bare and unsupported assertion of his opinion upon that question sufficient for that purpose. The fact that defendant said that he would not pay the plaintiff, and that he could not get the money furnishes no ground of arrest, even when coupled with the admitted assertion that he was going to Europe (*Hathorn agt. Hall*, 4 *Abb. R.*, 228). The intention of the pleader was doubtless to establish a cause of arrest under subdivision 2 of section 550, which is that he has removed, or is about to remove, his property, with intent to defraud his creditors, and the only evidence submitted is that defendant said that he would not pay plaintiff; that he was going to Europe, and the opinion of plaintiff that he was about to take away all his money and property. This is admittedly all that appears upon the record, and under such facts I cannot hold that a valid ground of arrest has been established.

Motion to vacate arrest granted, with costs.

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SUPREME COURT.

THE PEOPLE agt. AUGUST PLATT.

Practice — Criminal trial — Penal Code, sections 282, 283 — Conviction of abduction under section 282 — Evidence — When new trial will not be granted — Evidence corroborating the testimony of an accomplice required by section 283 — Sufficiency of.

The defendant was convicted of having taken a female under the age of sixteen years for the purposes of prostitution. The indictment charged the taking for purposes of prostitution. The evidence to support the indictment was that of the mother of the child as to her age; the evidence of the girl herself, also of a female physician as to the physical condition of the girl, and the evidence of two officers of the Society for the Prevention of Cruelty to Children as to the character of the place kept by the defendant and as to an interview with the defendant. On a motion for a stay pending appeal, after reviewing the evidence:

Held, that although it may be true an appellate court may order a new trial if it be satisfied that the verdict against the prisoner was against the weight of evidence, or against the law, or that justice requires a new trial, whether any exceptions shall have been taken or not in the court below, in this case the verdict does not seem to be against the weight of evidence, or against the law, or that justice requires a new trial.

The evidence of what the officers saw on the twenty-ninth of August was competent, because the girl was there then, and the character of the place in which the girl was then being kept was material to show the object of the keeping.

The character of the house being material, it having been shown what it was while the girl was there, it was competent to prove what it had been both before and after within reasonable limits, and that it was kept by the same proprietor and used for the same purposes so as to show the character of the place.

Both the mother and girl testified as to her age, and the statute allows the jury to consider her appearance in connection with the other evidence in determining the question of age.

It is not necessary to constitute the taking of the girl by the defendant that it was accompanied by force and violence. If the girl went to the defendant's place voluntarily, and he invited her in, and allowed her to remain there, and used her for purposes of prostitution, it would be a taking within the meaning of the statute.

What is required by section 283 of the Penal Code, as to corroborative testimony, is that there should be some fact deposed independently alto-

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gether of the evidence of the accomplice, which, taken by itself, leads to the inference not only that a crime had been committed, but that the prisoner is implicated in it.

The false denials of the defendant are strong corroborations of a criminal intent upon the part of the defendant in the keeping of the girl. The evidence of the officers show that the girl was at the defendant's place with his knowledge, and that it was a house of prostitution, and from these facts the jury might well infer entirely, independent of the girl's testimony, that the defendant was keeping her there for the purposes of prostitution. The evidence of the mother and the officers then showed, independent of that of the girl herself, she was under sixteen years of age, and was being kept by the defendant for purposes of prostitution. This was evidence of material facts leading to the inference not only that a crime had been committed, but that the defendant was implicated in it.

New York, Chambers, March, 1885.

THE defendant having been convicted of having taken a female under the age of sixteen years for the purpose of prostitution, makes this motion for a stay pending an appeal.

Wm. F. Howe, for motion.

De Lancey Nicoll, opposed.

VAN BRUNT, J. — The section of the Penal Code under which the defendant has been committed reads as follows:

"A person who takes a female under the age of sixteen years for the purpose of prostitution or sexual intercourse, or without the consent of her mother, father, guardian or other person having legal charge of her person, for the purpose of marriage, &c., is guilty of a felony."

The indictment charged the taking for purposes of prostitution. The evidence to support the indictment was that of the mother of the child as to her age, the evidence of the girl herself, also of a female physician as to the physical condition of the girl, and the evidence of two officers of the Society for the Prevention of Cruelty to Children as to the character of the place kept by the defendant and as to an

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interview with the defendant. The evidence of the girl was to the effect that in the latter part of July, 1884, while strolling around New York with a companion, she came to 141 Chatham street; that she then saw the defendant for the first time, and she asked him how much it was to see the entertainment, and he said: "Nothing, my little dear; come in." That the defendant then treated them and asked if they were going to stay there; her companion said "no," and she said "yes;" that the defendant took them both up stairs and had sexual intercourse with them, and the girls then went down stairs and waltzed around until one or two o'clock and went up stairs to bed, getting up about ten or eleven o'clock.

That there were seven or eight other girls there; that after three or four days she asked the defendant to buy her a new dress, and he bought it, and then she began to go up stairs with other men who paid her a dollar, which she gave to the bartender or to the defendant; that she stayed in the place until the end of August; that about half past six o'clock one evening she went to 107 Chatham street when the detectives were after her, and from there to the defendant's brother's place in Cherry street; that while the detectives were at defendant's place, she went into a little closet, and when she came out the defendant said that she would have to go for a while until it would all be over.

Officer Stocking testified that he knew the defendant, and that he first saw the girl in question August 29, 1884, at 141 Chatham street, between nine and ten o'clock; that officer Wilson was with him; that he saw there quite a number of men and women, among whom was the girl in question, some dancing, some drinking going on, &c.; that the defendant was there; that when they went in they asked for the proprietor, and the defendant was pointed out; that they asked him and he said he was; that noticing a girl rather young for the place; he asked him if her name was not Kate Cavanagh, the girl in question, and if she did not come from

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Newark ; that the defendant denied knowing any girl by that name, or any girl from Newark ; that upon turning again the girl was gone.

That witness further testified that up stairs the house was divided off into several rooms, and that every one had a bed, and that some had bunks three tiers high ; that the place was a dance hall and a house of prostitution combined. The witness then testified to other things he saw at this time. A motion was made to strike out this evidence which was denied and exception.

The witness then testified to going there September seventeenth, and that he saw some ten or fifteen men and women arrested. Defendant's counsel renewed his motion to strike out all of this evidence which was denied and exception. Officer Wilson testified to the same facts.

The learned recorder charged the jury, amongst other things, as follows :

" It was immaterial for which of these prohibited purposes she was taken. If she was, at the time of the taking, under the age of sixteen years, and was feloniously taken for the purposes of prostitution or of sexual intercourse, the person who does so violates the provisions of the statute and is guilty of the crime of abduction.

" There are two questions in this case which you are called upon to determine : Did the defendant take the girl Kate Cavanagh for the purpose of prostitution or sexual intercourse ? If you determine this question in the affirmative the next question for you to determine will be : ' Was she, at the time she was so taken, a female under the age of sixteen years ? ' If you find both of these questions in the affirmative you will convict the accused. * * * The first question for your determination, I repeat, is this : Did this defendant take the girl Kate Cavanagh for the purpose of prostitution or sexual intercourse ? If you determine that in the affirmative the next question will be, was she, at the time she was so taken, a female under the age of sixteen years ? If you find

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both questions in the affirmative, it will be your duty to convict the defendant of the crime charged in the indictment."

This is claimed to be error, because the only offense charged in the indictment was a taking for the purpose of prostitution. There, however, was no exception to this branch of the charge, and the attention of the learned recorder was not called to the fact that there was only one count in the indictment.

It may be true that an appellate court may order a new trial if it be satisfied that the verdict against the prisoner was against the weight of evidence or against the law, or that justice requires a new trial whether any exceptions shall have been taken or not in the court below, but in the case at bar the verdict does not seem to be against the weight of evidence or against the law or that justice requires a new trial. There are no exceptions to evidence which are well taken.

The evidence of what the officers saw at the place on the twenty-ninth of August was competent, because the girl was then there, and the character of the place in which the girl was then being kept was material to show the object of the keeping. From the testimony showing that the house was then a house of prostitution and that the girl was then there, it may be fairly inferred that she was there for purposes of prostitution.

The motion as to the evidence of September seventeenth was too broad, as it included the striking out of the evidence as to August twenty-ninth as well as that relating to what was seen at the place on September 17, 1884. I think, however, that the question as to the character of the house being material in having been shown what it was while the girl was there, it was competent to prove what it had been both before and after, within reasonable limits, and that it was kept by the same proprietor and used for the same purposes, so as to show the character of the place. It is urged that there was error in allowing the jury to consider the general appearance of the girl, in connection with the other evidence, in determining her age. It is sufficient to say that both the

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mother and the girl testified as to her age, and that the statute allows the jury to consider her appearance in determining the question of age.

The jury were not instructed to determine the age of the girl from her appearance alone, but that they might consider it in connection with the other evidence in the cause, and, therefore, were not allowed to "speculate," as is claimed by the counsel, as to the age of the girl.

The next question to be considered is, was there any evidence of a "taking" within the words of the statute? As the learned recorder said in his charge, "it is not necessary to constitute the taking of the girl by the defendant that it was accompanied by force or violence." If the girl went to the defendant's place voluntarily and he invited her in and allowed her to remain there, and used her for purposes of prostitution, it would be a taking within the meaning of the statute. This condition of affairs is fully borne out by the testimony. The girl's evidence is that the defendant invited her in, and to say the least allowed her to remain there, and that she had intercourse with men and paid the money to the defendant. These acts, taken in connection with the character of the house, certainly allowed the jury to infer that when the defendant invited the girl in, that it was with the intent to devote her to purposes of prostitution.

What do proprietors of houses of prostitution invite women into their establishments for? It is, not certainly that they may say their prayers, but rather, is not the inference that it is for the purpose of devoting them to their trade.

The next objection to the conviction is, that there is no corroborating evidence as is required by the statute. Section 283 of the Penal Code reads as follows:

"No conviction can be had for abduction, compulsory marriage or defilement upon the testimony of the female abducted, compelled or defiled, unsupported by other evidence."

It is claimed by the people that there is abundant evidence of corroboration.

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First. The testimony of the mother of the girl, who deposes that in the latter part of July the girl left her house without her consent.

Second. The testimony of the physician who examined the girl Katie Cavanagh and deposes that a sexual intercourse had been attempted upon her and had been accomplished to the extent of breaking the hymen.

Third. The conduct of the defendant when the officers of the Society for the Prevention of Cruelty to Children called at this brothel in Chatham street for the purpose of taking the girl. He evaded their questions and denied all knowledge of her, and

Fourth. The character of the place kept by the defendant.

The evidence of the mother in no wise corroborates the charge, because there is no evidence that the defendant enticed the girl from her home. The testimony of the physician is of no effect as evidence that the girl had had connection, or attempted connection, proved nothing against this defendant. The false denials of the defendant to the officers are strong corroborations of a criminal intent upon the part of the defendant in the keeping of the girl. The evidence of the officers show that the girl was at the defendant's place with his knowledge, and that it was a house of prostitution. From these facts the jury might well infer, entirely independent of the girl's testimony, that the defendant was keeping her there for the purposes of prostitution.

The evidence of the mother and the officers then showed, independent of that of the girl herself, that she was under sixteen years of age, and was being kept by the defendant for purposes of prostitution. This was evidence of material facts leading to the inference not only that a crime had been committed, but that the defendant was implicated in it.

It is reasonable to infer, from the evidence, that the girl was found in a house of prostitution, staying there with the knowledge of the proprietor, that it is by his invitation and for the purposes of his business. And such an invitation and devo-

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tion to such business constitutes the crime of abduction under the Penal Code, and the case is thus brought within the rule as to the corroboration laid down by the court in the case of *The People* agt. *Courtney* (28 Hun, 592). The court say: "What appears to be required is, that there should be some fact deposed independently altogether of the evidence of the accomplice, which taken by itself leads to the inference not only that a crime had been committed, but the prisoner is implicated in it." I am of the opinion, therefore, that there is no reasonable doubt as to the propriety of the conviction, and that a stay should be refused unless the defendant stipulates not to apply for bail pending appeal, to which the district-attorney has consented.

COURT OF APPEALS.

In the Matter of the several Accountings of the Executors of
WILLIAM TILDEN, deceased.

Surrogate — Jurisdiction over infants — Within what time a person must move to vacate decrees of surrogate made during his minority — Code of Civil Procedure, sections 2481, 1282 to 1291 — Appeal — What orders are final and reviewable in court of appeals.

A petition for the vacation of certain decrees made by a surrogate upon several accountings, by one who was an infant at the time the decrees were made, where the ground of relief is the infancy of the party applying, must be made within one year from the time the petitioner attains his majority.

Where there were four successive decrees of the surrogate, which, before the attempt by motion to vacate them, had stood unquestioned for eleven, nine, six and three years respectively; the infant, a party duly served in all, had come of age three years before he made his motion. In respect to the oldest decree alone, a defect amounting not to an irregularity, but at most (if anything) to what is strictly known as "error in fact *de hors* the record" being alleged, and in respect to the other three no irregularity and no error in fact was even alleged. The judgment or order appealed from vacates them all, the first for the alleged error in fact, the other three for negligence in the guardians *ad litem*, or in

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the surrogate, the charges of fraud in respect to all not being passed on, or made grounds of the action of the court:

Held, that the supreme court at general term had no jurisdiction or power, *on motion*, to vacate either of the decrees, because the time allowed for that purpose by the statute had expired before the application was made.

The order setting aside the decrees was the necessary termination of the proceedings, and rendered it a final order within the meaning and intent of the statute, and as the court below had no power to make the order it is reviewable here.

Decided March, 1885.

THIS is an appeal from orders of the supreme court at general term in the first department, vacating decrees entered by the surrogate of New York county upon accountings of executors. The surrogate had denied the application to open the decrees. The supreme court reversed the decision of the surrogate, and opened the decrees and allowed the applicant to contest items in the accounts upon which the decrees had been entered. The final order of the supreme court is also appealed from, so that the entire proceedings are brought up for review, and the case is now presented upon the complete and full record. The appellants claim that the supreme court had no jurisdiction or authority to open the decrees upon the case presented. The person making the application was Beverly B. Tilden, the youngest son of William Tilden, deceased, and the accountings so opened were had by the executors of his father's estate, during his minority, in the surrogate's court. At the time of his father's death in 1869, the applicant was ten years old, being the youngest of four sons, the other three being named William, Milano and Marmaduke. Their mother, Almira Tilden, also survived their father. The original executors of the will were Charles Tracy, Moreau Delano (since deceased), David Dows, William Tilden Blodgett (since deceased) and Josiah M. Fiske. Subsequently, Nathan C. Ely and William Tilden, Jr. (the eldest son), became executors also. The testator left a considerable estate of personalty and realty. After providing for special legacies,

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annuities and other charges, the testator gave the rest and residue of his estate: "Unto my children who shall survive me and the issue me surviving of any of my children who may be then deceased, in equal shares to such surviving children, and such surviving issue of a deceased child, taking the same share its parent would be entitled to if then living. To have and to hold unto them such surviving children and issue, and to their respective heirs, executors, administrators and assigns, for their own use, benefit and behoof respectively, forever, subject, nevertheless, to the powers and directions in this will contained, and to the due and full execution of such powers and directions." * * *

"Twelfth. It is my will that my executors shall, and I authorize, empower and direct them to possess, manage, invest and preserve all and singular the several and separate shares and portions of my said surviving children, and of any descendant being of the issue now surviving of any child of mine deceased before my death under this will, until such child or descendants shall attain the full age of twenty-one years, if he or she so long shall live; and during such period to apply the rents, income and profits of such share and portion to the use of such child or descendant respectively, with liberty to make such application of such rents, income and profit, or any part thereof, by paying the same to my said wife, to be laid out and expended in her discretion for the support, education, comfort or improvement of such child or descendant. And I hereby nominate, constitute and appoint my said wife guardian of all my children, and dispose of the custody and tuition of all my children during their respective minorities unto her." In pursuance of the authority thus conferred on them, the executors paid over to Mrs. Tilden and took her receipt for such part of Beverly's share of the income as was not retained by them. The entire management and control of their education, mode of life and expenditure was left with her. She was advised only by Mr. Blodgett, a near kinsman of her husband's family. In the year 1871 the

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executors commenced a first accounting in the surrogate's court. Their petition stated the minority of Beverly B. Tilden and his mother's testamentary guardianship for him. The citation was duly served both on Beverly and his mother. The citation as so served contained notice of an application to the surrogate to appoint a guardian *ad litem* for Beverly. On the return of the citation, the surrogate appointed an auditor and referred the account to him in accordance with the practice then prevailing in his court. The account was duly filed and vouched for. It showed that such parts of the shares of income coming to the four minor sons, as were paid over by the executors had gone into Mrs. Tilden's hands, pursuant to the directions of the will, or had been paid out as directed by her and charged to each one's account as she directed. The sums were stated in detail and vouched for by Mrs. Tilden. These payments to Mrs. Tilden, as guardian for her minor sons were made the subject matter of a special report by the auditor, also of a special clause in the surrogate's decree on the accounting, as follows: "And it also appearing that pursuant to the twelfth clause of said last will, the said executors and trustees have made sundry payments of unequal amounts to the widow of said testator, on account of his four children, William, Milano, Marmaduke and Beverly, all of whom are still minors, and of whom she is the testamentary guardian, which amounts are specified in the foregoing summary of said account. Now, therefore, it is further ordered, adjudged and decreed that the said several and specified sums of payments to said widow and testamentary guardian on account of said minors, with interest on the same items from the specified dates of payments, are chargeable, and that the same be charged as advances on account of income of and from their respective shares of the capital of said estate vested in said executors, subject to the trusts created for their benefit, by and under said will during their minority respectively." The decree on this first accounting was entered May

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25, 1872. It is set aside by the supreme court. After William, the eldest son, had come of age in 1874, the executors had a second accounting. Beverly and his testamentary guardian were again duly served with the citation, but chapter 156 of the Laws of 1874 having then been enacted requiring the appointment of a special guardian for minors upon accountings, such guardian was appointed. The account was also referred to, and examined by, an auditor duly appointed by the surrogate and found correct and duly passed. In this account the same facts also appeared respecting the payment to Mrs. Tilden, as testamentary guardian, of such parts of the shares of the income of the minors as was paid over by the executors. The items charged to Beverly and Mrs. Tilden's vouchers in respect of them were accepted and approved. The decree on this second accounting was entered July 30, 1874. It also is set aside by the supreme court. After Milano, the second son, had come of age, and in 1877, the executors had a third accounting. Mr. Blodgett had in the meantime died. Beverly and his mother, as testamentary guardian, and Mr. Blodgett's executors, were all duly served with the citation. A special guardian was appointed for Beverly. The account of the executors was presented and passed. It then appeared that at the request of the two sons who had come of age, the estate, realty and personalty, had been kept "as an entire and undivided property for the benefit of all the heirs," and that in order to equalize the accounts of the four sons an interest account had been kept with each of them, in the manner directed by the surrogate in the decree on the first accounting; and that the sums charged to Beverly had been paid over to his mother as his testamentary guardian, as directed by the will. Mrs. Tilden's vouchers for the items so charged to Beverly were furnished and accepted. The decree on this third accounting was entered June 7, 1877. It too was set aside by the supreme court. After Marmaduke, the third son, had come of age, and in 1880, the executors had a fourth accounting. The citation was duly served on

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Beverly and his mother. Beverly was then over twenty years old, and himself with his mother applied for the appointment of a special guardian. The person selected by them was appointed, examined Beverly's account and passed the same. The account was also examined and passed by an auditor appointed for that purpose by the surrogate. Like facts also appeared as to holding the estate as an entirety, the payment of income to Mrs. Tilden as testamentary guardian for Beverly, and her vouchers for the items of such payments were accepted and approved. The decree on this fourth accounting was entered April 30, 1880. It too was set aside by the supreme court. After Beverly came of age he, with his three brothers, entered into an agreement in writing, dated March 26, 1881, whereby they appointed three competent persons as appraisers of certain realty belonging to the estate, for the purpose of dividing it between them, and requested the executors, upon the appraisal, to make four parcels as nearly equal as possible, and provided for an auction between themselves for the right of choice of such parcels, and for charging to each one's share the sum bid by him for his choice. The said agreement also provided for a restatement, without interest, of the moneys which each of the sons had, from time to time, received from the executors, and that such of the four sons as were not debtors in the accounts should receive from the executors deeds for their parcels, and be charged in distribution with the appraised values thereof, and that each of them who was debtor in the accounts should receive deeds for his parcel in case he should either pay the balance due from him, or should pay the appraised value of his parcel, or execute a bond and mortgage on his parcel for its appraised value, or separate bonds and mortgages on the several lots composing his parcel for their respective appraised values, their total aggregate amount, however, not to exceed the balance due from him. The said agreement also contained provisions for distributing any parcel or parcels not taken at their appraised value among those who were not debtors, and for the pay-

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ment of proceeds of any bonds and mortgages received by the executors towards equalization of the several accounts in preference to applying them in payment of the mortgages given by any one of the sons. The appraisal was had, also the auction between the sons, and in pursuance of the agreement, land of the appraised value of \$520,190.66 was conveyed by the executors to the four sons, and by means of payments and transfers of securities to cover inequalities, each one's account was brought up to the sum of \$336,064.83. The transaction was finally completed in November, 1881. The facts respecting the agreement and their acts under it were fully stated in the executor's fifth accounting, and which said fifth accounting had been instituted after the distribution of realty had been carried out and was pending at the time Beverly applied to the surrogate to open the decrees in question. Beverly came of age December 10, 1880. His proceedings to set aside the decrees were commenced April 2, 1883, some two years and more after he came of age, and a year and a-half after the "advancement accounts" of himself and his brothers under the distribution agreement had been adjusted, and he had received his proportionate share thereunder, and had actually sold and disposed of some portion of the realty which he had thus received. The surrogate held that Beverly was estopped to make the application. The supreme court not only reversed the surrogate's decision, but proceeded to open the decrees and allow Beverly to contest the accounts in respect of items charged to his account, assigning as principal reason therefor that although the money had been actually paid to Mrs. Tilden, yet Beverly on coming of age had the right to contest the items, because they seemed large in the opinion of the supreme court.

The following is the opinion of the surrogate, denying the application of Beverly B. Tilden to open the decrees in question :

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ROLLINS, S.—The moving papers herein assert, among other things, that out of the funds of this estate there have been distributed by its executors, to the brothers of this petitioner, sums of money largely in excess of their just and lawful claims, and that moneys appropriated to the petitioner's own use during his minority were so carelessly disbursed and so excessive in amount that the four several decrees, whereby the executor's accounts have been from time to time judicially settled, ought to be opened for affording him opportunity to interpose objections. If nothing had occurred since the entry of these decrees to forbid my reviewing the accounts to which they relate, I should feel bound, in view of the allegations in the moving papers, to grant the petitioner the relief for which he prays, or at least to direct the taking of testimony for ascertaining whether or not he had suffered any injustice. But there is, as it seems to me, an insuperable obstacle to either of these courses.

In March, 1881, an agreement in writing was entered into by the petitioner and his three brothers. That agreement purports to have been executed for the purpose of effecting an adjustment of advances made to the children, and of their interests in their father's estate, and it provides for a distribution of the entire estate, except such part as the executors may find it necessary to reserve for satisfying the testator's provisions for the benefit of his widow and of certain other beneficiaries. The executors, in pursuance of such agreement and of the subsequent adjustment effected between the parties, proceeded to make distribution. I think that the petitioner became thereby estopped from making such objections as he now seeks to interpose in this proceeding. He claims that he had then but recently reached his majority, that he was not advised as to his rights or as to the condition of the estate, and that he was induced by the executors or some of them to become a party to an agreement into which he would not have entered had he been made fully acquainted with the facts. He accordingly asks that such

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agreement be ignored, and that he be permitted to attack the accounts which are claimed to be thereby adjusted.

Manifestly, the rectification of any injustice which the petitioner may have suffered by reason of the settlement and distribution referred to would practically involve the rescinding of the compact between the testator's children, upon which they and the executors have acted, and would also involve a disturbance of the allotments which have been made in pursuance of its provisions. I have no power to enter into any inquiry as to the validity of this agreement as between the persons who executed it. It is not apparent how, in the absence of such power, I can hold the executors amenable to my jurisdiction for their connection with the settlement in question. To effect the purpose sought to be accomplished by the petitioner, the agreement must be directly assailed and set aside, or the executors in some action for that purpose be made responsible for any injury which the petitioner has suffered by their action in inducing him to become a party to such agreement. Neither relief is it within the power of the surrogate to grant.

Petition denied, without costs.

An appeal from the order of the surrogate was taken to the general term of the supreme court, who reversed the order and entered an order directing the four decrees to be so far set aside and vacated as to allow the charges drawn in controversy by the applicant to be made the subject of future investigation (*See case reported, 67 How, 447.*)

A motion was made on behalf of the executors to vacate certain orders heretofore entered, and for a rehearing of the appeals heretofore determined against them. The following is the opinion of the general term on such motion:

DANIELS, J. — The appeals taken in the proceedings were decided by this court in the early part of the year 1884, and after the forms of the orders had been settled, but before the

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direction was given for their entry, an application was made on behalf of the executors for the reargument of the principal appeals, and also for an order permitting the surrogate to correct and supply alleged deficiencies in his return. The case presented in support of the appeals was thereupon re-examined, and the conclusion was adopted that a reargument could be of no benefit to the executors, and their application so far was denied. It was not decided then, neither had it been when the decision was first announced, that upon a re-examination of the accounts of the executors, they could be held responsible for anything beyond what they had been charged with by the decree of the surrogate. But it was concluded that a proper case had been made to appear, permitting the appellant, who was one of the next of kin of the testator, and a devisee and legatee under his will, to secure a re-examination of the accounts of the executors, after he had attained the age of twenty-one years, which he did shortly before his application was made to the surrogate for liberty to make that re-examination. It was claimed in support of the application, that during his minority his interests in the estate had not been protected as they should have been upon the several accountings which had taken place. And by an examination of the case containing the accounts, the result was considered to be sustained that he was entitled to a further hearing before the surrogate, in which he should be at liberty to contest the large charges made against him in the accounts of the executors. Whether they improperly charged him for any sums of money contained in their accounts, or he could succeed in showing their charges to be excessive, or in any manner unfounded, was not a matter determined by the decision of the court. But all that was held was that sufficient had been made to appear, in view of the circumstances disclosed by the case, to entitle him to a full and complete investigation of the charges made by him against the executors. The direction was intended to be given as much in their interest as it was in his,

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to enable them, if his charges should prove to be unfounded, to be properly vindicated against them.

It may be, as it was attempted to be shown in support of the application for the re-argument, that the items relied upon as justifying the decision announced were not as large as they were deemed to be on the examination of the accounts which took place. But even if they were not, they were sufficiently formidable to justify the decision of the court in directing that a further investigation, as to their legal and equitable property, should be made at the instance of the person whose share in the estate of his father was affected by them, and accordingly the motion for a reargument of the two appeals affecting the executors was denied.

After this denial an order was made on behalf of the executors directing the return of the surrogate to be transmitted to him for further consideration and amendment, in case it should be found to be deficient, and in the order giving that direction, a further hearing was provided for in case that should be rendered necessary by changes in or additions to the surrogate's return. The chief complaint then made was, that the paper contained in the return and designated as exhibit A, and the testimony of a witness taken in the proceeding before the surrogate should form no part of the papers upon which the appeals should have been heard and disposed of. This was for the first time raised after the appeals had been heard and decided. No previous intimation that the case, as it was presented, was in any respect defective. But it was assumed upon the argument by both parties to be in a proper condition for the consideration and decision of the appeals. But as there was alleged to be a misapprehension concerning its contents, and that it was first discovered after the decision had been announced, an order transmitting the return to the surrogate was made. The examination which was thereupon made by the surrogate resulted in a certificate that the printed case was correct in both the particulars to which objection had in this manner

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been made, and upon that certificate being brought before the court the orders, which had previously been settled, were directed to be entered. But intermediate to the time when the certificate of the surrogate was returned, and the orders were in fact entered, an order was made by the surrogate, at the instance of the executors, requiring their application for the correction of the return to be further considered. This was not brought by either party at the time to the attention of this court, and for that reason the orders declaratory of the decision on the appeals were entered during the pendency of this order of the surrogate. He, however, proceeded to make a further examination of the objections presented by the executors to the return, and returned to this court as papers before him upon the hearing of the application of the appellant for a re-examination of the accounts of the executors, all the papers in the proceedings, together with the statements of the accounts, whether remotely or directly bearing upon the application before him to vacate and set aside the preceding decrees. And upon these papers being now returned, a further application for a reargument of the appeals has been made to the court.

But the additions returned by the surrogate do not appear to require any further hearing before this court than can be given to the case in the disposition of this application. The large mass of the papers returned, while they were in fact used before the surrogate, were entirely inapplicable to the subject then brought to his attention, and as such they can receive no consideration of the disposition of the present motion. These are the formal proceedings taken by the executors on the different accountings to bring the parties in interest before the surrogate. They can have no practical effect in the determination of the motion. For even if it should be assumed, as it probably should not, that subdivision 6 of section 2481 of the Code of Civil Procedure did not apply to the proceeding, for the reason that those taken before the surrogate for the accountings were instituted

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before that portion of the Code went into effect, it would not change the disposition that should be made of the application for a reargument. For without that provision, and under the preceding law, this court was authorized to review the orders made by the surrogate, and if it was not considered to be supported to reverse it, and direct a further hearing of the matters in controversy before him, and that is all that was designed to be accomplished by the decision which was made. It was to place the appellant at liberty to have the executors' accounts, which had been settled during his minority, re-examined after he attained his majority, and to have a final determination made as to their accuracy, and the justness of the charges against him that the decision announced was made, and whether the court should proceed under the former law, or that included in the Code, it had the power and authority to give the directions which it did. But as the applications were made to the surrogate after the 1st of September, 1880, this provision of the Code did apply to these appeals.

A further and larger portion of the papers returned included statements of the estate of the testator, of property sold by the executors, of debts paid by them, of interest and rent collected by them, of expenditures made on account of the estate, debts collected of debtors, and legacies paid to the widow, and the other children of the testator. These statements formed a large part of the bulk of the accounts returned by the surrogate as being before him on the hearing of the application made by the appellant. As to them no question was made. It was not asserted that the executors had received more than they stated they had, or that they had paid out less than was set forth in their accounts, and consequently these accounts have no relevancy whatever to the points in controversy, and excluding them as well as the formal papers previously mentioned from consideration, but a very small part of the accounts returned by the surrogate have any pertinency to the disposition of the motion now made on behalf of the executors,

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and they are the accounts of moneys disbursed for or on account of Beverly B. Tilden, the appellant, and they are all included in about thirteen pages of the four hundred and two now returned, as containing matters which were before the surrogate upon the hearing of the application for relief from the preceding decrees, made in behalf of the appellant, and a correct summary of such expenditures and disbursements appears to have been contained in what has been called exhibit A in the original case, to which the executors have so strenuously objected. These accounts of moneys paid out or disbursed for or on behalf of Beverly B. Tilden amount to the same sum as was previously stated in exhibit A. The executors' contention has been, that in that exhibit the different items were collected and added together in making up the statement, while in the accounts now produced the items themselves are set forth with a greater degree of particularity. As to one, however, the same summary was made, that is, the item of \$4,803.24 for his share of the household expenses, and that has been stated substantially the same in the accounts as they have been at present returned, as it previously had been in exhibit A. What the appellant mainly complained of was, that he had been charged with more moneys than in the discreet and careful discharge of the duties of the executors he should have been charged with during his minority. It was not alleged that these moneys had not been paid over by the executors, but that the amounts paid over were so excessively large as to render the payments for his maintenance and education entirely unjustifiable and improper, and for that reason liberty to examine and contest their accounts was asked by him in the application made in his behalf to the surrogate. And as these payments aggregated together form no larger sums than now appear to be in detail in the accounts of the executors, their addition cannot be an important fact to be considered in the case. For the fact still remains that the charges made by them for moneys disbursed among the minority of the appellant are

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still in like manner as they were when more fully aggregated and stated in exhibit A. The expenditures charged remain precisely the same. So much of the interest of the appellant in the estate of his father is alleged to have been appropriated to his use. The entire amount has not been changed, but only the manner of stating it, and it is to the expenditures themselves that the objections taken in behalf of the appellant before the surrogate were in fact presented. The merits of the objections remain unchanged, and practically stand upon the same ground that they did when the case was first heard and considered by this court, and a further hearing and examination of them than that which has been given upon the points presented in support of this application, would be of no practical service to the executors. The controlling facts remain still the same, apparently entitling the appellant to a re-examination and reconsideration before the surrogate, of the charges complained of by him, as improperly made against him in the executor's accounts during the period of his minority. While the application was pending before the surrogate for his further return, the executors appealed from the order of this court to the court of appeals, where the case is now shown to be in readiness for argument. That should not be delayed or prevented by an order made by this court, when from the facts appearing in support of the application it is quite evident that no change can be made in the directions already given for the disposition of these appeals. But what the court should do, is to confirm its own orders already entered, notwithstanding the fact that the accounts themselves have been further itemized, and though no substantial change has been made in the case, the executors should be at liberty to add the additional return of the surrogate to their appeal taken to the court of appeals, for its consideration by that tribunal. That direction should accordingly be given, and the motion for a reargument of the appeals denied.

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On appeal to this court from the orders of the supreme court at general term;

Joseph H. Choate and *C. E. Tracy*, for the executors, appellants, made and argued the following points: (1.) Neither the surrogate nor the supreme court had power upon a proceeding of this nature on a mere motion, to be heard on affidavits, to set aside the decrees in question, because the time allowed for that purpose by the statute had expired before the application was made. In making its orders the supreme court relied upon Code of Civil Procedure, section 2481, subdivision 6, whereby it is provided that the surrogate shall have power "to open, vacate, modify or set aside * * * a decree" or order of his court, or to grant a new trial or a new hearing for fraud, newly discovered evidence, clerical error or other sufficient cause. The powers conferred by this subdivision must be exercised only in a like case and in the same manner as a court of record and of general jurisdiction exercises the same powers. Upon an appeal from a determination of the surrogate, made upon an application pursuant to this subdivision, the General Term of the supreme court has the same power as the surrogate, and his determination must be reviewed as if an original application was made to that term. Courts of record and of general jurisdiction, however, have only such powers in this regard as are conferred on them by Code sections 1282, 1291. A motion to set aside a judgment for "irregularity" must be made within one year (*sec.* 1282) and "for error in fact not arising upon the trial," within two years (*sec.* 1290), and where the applicant is under disability for infancy, the time cannot be extended "more than one year after the disability ceases" (*Sec.* 1291). As already stated, the last in order of the decrees in question was entered April 30, 1880. Beverly came of age December 10, 1880. As a minor just come of age, he had, until December 10, 1881, in which to move against the first three decrees, and until April 30, 1882, in which to move against the fourth decree. His motion was not made until April 2, 1883. It was a year too

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late to move, whatever may be or may have been his right to bring an action founded on allegations of fraud. There was therefore an absolute want of jurisdiction in either court to entertain the motion, much less grant it. The want of jurisdiction may be set up at any time, either on appeal or otherwise, provided it arises out of matters which are not amendable. Precisely such a case as the one at bar was dismissed upon this ground by the same General Term (*In the Matter of Becker*, 28 *Hun*, 207). The point was distinctly taken in the supreme court, and it should have dismissed the case "as if an original application was made to that term." The ruling in *Matter of Becker* (28 *Hun*, 207), that although the statute in terms required the appointment of a guardian *ad litem*, still the decree was not for that reason void, but only voidable upon proper proof of fraud or collusion, is in accordance with established rules of law (*McMurray* agt. *McMurray*, 9 *Abb. [N. S.]*, 315; *McMurray* agt. *McMurray*, 66 *N. Y.*, 175; *De Witt* agt. *Post*, 11 *Johns.*, 460; *Harris* agt. *Youman*, 1 *Hoffm. Ch.*, 178; *Mills* agt. *Denio*, 3 *Johns.*, *Ch.*, 367; *Freeman on Judgments*, sec. 151; *Daniel's Ch. P.* [5th ed.], p. 164; *Brick's Estate*, 15 *Abb. Pr.*, 12). Fraud, collusion or other like error, must therefore be proved and found before decrees regularly entered can be set aside. The supreme court, therefore, had no jurisdiction in the absence of proof of fraud, or a finding of fraud by a competent trial court, to set aside the decree in question. The exact case presented by the record is this: There are four successive decrees of the surrogate, which, before the attempt by motion to vacate them, had stood unquestioned for eleven, nine, six and three years respectively. The infant, a party duly served in all, had come of age three years before he made his motion. In respect to the oldest decree alone, a defect amounting not to an irregularity, but at most (if anything) to what is strictly known as "error in fact *dehors* the record" is alleged. In respect to the other three, no irregularity and no error in fact is even alleged. The judgment or order appealed from

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vacates them all, the first for the alleged error in fact, the other three for negligence in the guardians *ad litem*, or in the surrogate, the charges of fraud in respect to all not being passed on, or made the grounds of the action of the court. It is confidently submitted that the supreme court at general term had no jurisdiction or power *on motion* to vacate either of the decrees, either on the grounds stated in their opinion as the grounds of their action, or on any ground. If the petitioner had any case for vacating either decree, he could proceed only by a regular bill in equity, in which the executors could have an opportunity to defend themselves, which in this proceeding was impossible.

S. P. Nash and *W. S. Macfarlane*, for Beverly B. Tilden, respondent.

RUGER, Ch. J. — The jurisdiction of this court to entertain this appeal is questioned upon two grounds, viz.: 1st. That the order appealed from is not final; and 2d. That its allowance rested in the discretion of the court below and is not reviewable here.

We think the first ground is not tenable. The proceeding terminating in the orders appealed from contemplated one result only, viz., the annulment and vacation of the several decrees of the surrogate challenged by the petitioner. No other relief was sought, and although its allowance might involve other proceedings they were ulterior and altogether disconnected from that pending. Such subsequent proceedings, if instituted, would in no sense be founded upon the relief granted in this proceeding; but the granting of such relief would simply remove defenses which might otherwise be made to such subsequent proceedings. The order setting aside the decree was the necessary termination of the proceeding, and rendered it a final order within the meaning and intent of the statute. The validity of the second objection depends upon the power of the court below to vacate the

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decrees. Assuming the existence of such power the order was wholly a discretionary one and, therefore, not reviewable here.

We are of the opinion, however, that the power did not exist. The decrees sought to be vacated were made by the surrogate upon several accountings had on May 25, 1872, July 30, 1874, June 7, 1877, April 30, 1880, respectively. The petitioner alleges the actual service of a citation in each and all of the accountings, and that such service was duly made upon him for each of the hearings, resulting in the three last decrees. Each decree recites due service of a citation, not only upon the petitioner, but also upon his general guardian for each of the accountings. The three last decrees each recite the appointment of a special guardian duly made to protect the interests of the petitioner, and the last decree shows that such guardian was appointed upon the personal request of the petitioner. These circumstances, together with a sworn petition alleging the jurisdictional facts upon which the accountings were based, afforded such evidence of the proper service of citations as could be impeached by proof of fraud or collusion only (*Secs. 2473, 2474*). The petitioner was of the age of twelve, fourteen, seventeen and twenty years, respectively, when the respective decrees were made, and arrived at the age of twenty-one on the 10th day of December, 1880. The petition for the order vacating such decrees was filed before the surrogate on March 31, 1883, more than two and a-quarter years after he had arrived at majority and about three years after the last decree was made. He alleges that in the various accountings had before the surrogate numerous items for disbursements and expenses during his minority were erroneously charged to his account by the executors, and various items were erroneously credited on the accounts and allowed by the surrogate in the several decrees to one of the executors. The affidavits and proof in the case render it probable that these allegations in some respects might be sustained by evidence upon a new accounting; but the question arises whether

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the petitioner's right to such an accounting is not barred by the statute. The court below set aside and vacated all of the surrogate's decrees so far as they affected the petitioner upon the ground of his minority and for alleged irregularities in the service of the citations for the first and third accountings alone, and upon the further ground that it presumptively appeared from the moving papers that the petitioner had suffered injustice by the decrees in question. No question was made as to the regularity of the proceedings on the second and fourth accountings. No allegation or evidence of fraud or collusion in any of such accountings was suggested upon the hearing below or in this court, nor was there any complaint that all of the moneys charged by the executors were not actually paid by them as alleged in the several accounts.

It appeared that upon the various accountings before the surrogate, each succeeding account after the first was based upon the one preceding, and that the balance of assets found and adjudged to be in the hands of the executors by the prior decree, was made the foundation of the next account, and the validity of each previous account and decree being unchallenged by any objection, was assumed and adjudged to be correct in each succeeding accounting and judgment. The balance appearing by the third decree was, upon the fourth accounting, stated in the account as the just and true amount of the assets in the hands of the executors at the date of that decree, and any of the heirs or legatees might have controverted that allegation if any reason existed why the decree fixing that amount was not binding upon him. It follows that each successive decree instituted upon citations duly issued and served upon the parties interested in the estate, whether adults or minors, and based upon proceedings regularly conducted, was binding and conclusive upon each of such persons as to the validity of any prior decree which entered into and was made the basis of the subsequent accounting.

There can be no doubt that these various decrees were binding upon all the adult heirs and legatees who were duly cited

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to appear, and that they have been set aside as to the petitioner solely on account of his minority and his presumed incapacity on account thereof, to properly guard his interests on the accountings. The question then arises whether his minority constitutes a sufficient reason why decrees taken against him under proceedings regularly conducted in all respects, should be vacated and annulled.

The statute provides a method by which errors occurring on trial and proceedings before a surrogate shall be corrected and reviewed, but this is not claimed to be such a proceeding and is not therefore within those provisions (*Chap. 18, tit. 2, art. 4, secs. 2568 to 2589*). Section 2481 provides that a surrogate has power "to open, vacate, modify or set aside, or to enter as of a former time a decree or order of his court, or to grant a new trial or a new hearing for fraud, newly discovered evidence, clerical errors or other sufficient cause. The power conferred by this subdivision must be exercised only in a like case, and in the same manner as a court of record and of general jurisdiction exercises the same powers." It is further provided that the general term of the supreme court has upon appeal from an order made under this provision the same power as the surrogate had to grant or deny the same. We are thus referred by this section to the power possessed by courts of record over judgments rendered by them in order to ascertain the authority conferred upon surrogates by this section. For errors committed upon the trial of actions in those courts detailed proceedings are also provided by statute, and a right of review depends upon a strict compliance with such provisions. Other cases in which relief may be obtained upon motion for irregularities and errors of fact not arising upon the trial are provided by the Code, and those provisions are intended to embrace all of the grounds for relief not included in regular proceedings for review upon appeal, and those which are not attainable by an action to vacate and set aside judgments and decrees. Thus it is provided that motions may be entertained in courts of record to set aside

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judgments for irregularity, but the time within which this may be done is limited to one year after the filing of the judgment-roll (*Sec. 1282*).

It is also provided that a like motion may be made to set aside a final judgment for error in fact not arising upon the trial, but this relief must be sought within two years from the filing of the judgment-rolls (*Secs. 1283 and 1290*). In case the person against whom the judgment is rendered is within the age of twenty-one years at the time of its filing, the time of such disability is not a part of the time limited by section 1290 for the commencement of the proceedings for relief, except that such disability can in no case extend beyond five years or authorize the relief provided by those sections if applied for more than one year after such disability ceases.

Relief from judgments regularly taken against minors for errors of fact not arising upon the trial must be applied for within one year after the minor reaches his majority, and the necessary implication from this requirement is that after that time no relief can be had by motion in the cases mentioned in the statute.

It was well settled under the former practice of the court that the minority of a party to an action when urged as the ground of a proceeding to set aside a judgment or decree rendered against him, constituted an error of fact which might be alleged and proved *dehors* the record.

The fact of infancy could formerly be taken advantage of by writ of error, or according to the English practice by an original bill impeaching the decree rendered against the minor for fraud or collusion, or that no day had been given to him to show cause against it (*McMurray agt. McMurray*, 66 *N. Y.*, 175; *Arnold agt. Sandford*, 14 *Johns.*, 417; *Peck agt. Coler*, 20 *Hun*, 534).

In the case of *Woods agt. Pangburn* (75 *N. Y.* 495), it was held that the general term of the supreme court had no power to set aside a regular judgment which had not been paid. This court held in *Dinsmore agt. Adams* (66 *N. Y.*, 618),

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that a motion to vacate a judgment taken by default on the ground of mistake, inadvertence, surprise or excusable neglect, made after a delay of one year from the time of its entry, was barred by the provisions of section 174, of the Code of Procedure, although such provisions did not apply to a similar motion based upon fraud. The causes for which judgment might be vacated under section 174, are analogous to those contained in sections 1282, 1283, and 2481 and seem to us to be governed by the limitations imposed therein, except in cases when fraud and collusion is made the ground of application for relief.

A judgment sought to be set aside on the ground of fraud or collusion, or as being void for any reason, or when the court has not acquired jurisdiction of the person against whom it is rendered, is, of course, not governed by these limitations (*Foots v. Lathrop*, 41 *N. Y.*, 359), but when the ground of relief is the infancy of the party applying, we think the application is analogous to those arising under section 174, and is governed by the provisions of section 1283 and 1290, and should, therefore, be made within one year after the minor arrives at the age of twenty-one years.

It follows from these views that the order of the general term should be reversed, and that of the surrogate affirmed, with costs.

All concur.

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U. S. SUPREME COURT.

Ex parte: In the Matter of CLINTON B. FISK, petitioner.

**Practice — To what extent the practice, pleadings and forms, and mode of proceedings of the state and courts, shall apply in this court — Examination of party before trial — United States court sitting in New York no power to compel party to submit to such an examination.*

The principle that in actions at law the laws of the states shall be regarded as rules of decision in the courts of the United States (*sec. 721, Rev. Stat.*) and that the practice, pleadings and forms, and modes of proceedings in such cases, shall conform as near as may be to those of the courts of the states in which the courts sit (*sec. 914*), is applicable only where there is no rule on the same subject prescribed by act of congress, and where the state rule is not in conflict with any such law.

The statute of New York which permits a party to a suit to be examined by his adversary as a witness at any time previous to the trial, in an action at law, is in conflict with the provision of the Revised Statutes of the United States, which enacts that "the mode of proof in the trial of actions at common law shall be by oral testimony and examination of witnesses in open court, except as hereinafter provided" (*Sec. 851*).

None of the exceptions afterwards found in sections 863, 866 and 867, provide for such examination of a party to the suit in advance of the trial as the statute of New York permits.

The courts of the United States sitting in New York have no power, therefore, to compel a party to submit to such an examination, and no power to punish him for a refusal to do so.

Nor can the United States court enforce such an order made by a state court before the removal of the case into the circuit court of the United States.

Where a person is in custody, under an order of the circuit court, for contempt in refusing to answer under such an order, this court will release him by writ of *habeas corpus* on the ground that the order of imprisonment was without the jurisdiction of that court.

New York, March, 1885.

PETITION for writs of *habeas corpus* and *certiorari*.

Wheeler H. Peckham, for petitioner.

John R. Dos Pasos, for the marshal.

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MILLER, J. — This is an application on the part of Clinton B. Fisk for a writ of *habeas corpus* to be directed to the marshal of the southern district of New York, in whose custody the petitioner is held under an order of the circuit court for that district.

The history of the case, which resulted in this order so far as it is necessary to the decision of the matter before us, may be briefly stated as follows: Francis B. Fogg brought suit in the supreme court of the state of New York against Fisk to recover the sum of \$63,250 on the allegation of false and fraudulent representations made by Fisk in the sale of certain mining stocks.

In the progress of the suit, and before the trial, the plaintiff obtained from the court the following order:

“*Ordered*, That the defendant Clinton B. Fisk be examined and his testimony and deposition taken as a party before trial, pursuant to sections 870, 871, 872, 873, &c., of the Code of Civil Procedure, and that for such purpose he personally be and attend before the undersigned, a justice of this court, at the chambers thereof, to be held in the new county court-house, in the said city of New York, on the 31st day of January, 1883, at eleven o'clock in the forenoon of that day.”

A motion to vacate this order was overruled and the judgment finally affirmed by the court of appeals. Thereupon the defendant appeared before the court and submitted to a partial examination, answering some questions and objecting to others, until, pending one of the adjournments of the examination, he procured an order removing the case to the circuit court of the United States. In that court an order was made to continue the examination before a master, to whom the matter was referred. The defendant refusing to be sworn and declining to be examined, he was brought before the circuit court on an application for attachment for a contempt in refusing to obey the order. Without disposing of this motion the circuit court made another order, to wit:

“It is hereby ordered and adjudged, that the motion to

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punish the said defendant for such contempt stand adjourned to the next motion day of this court, to wit, on the 28th day of March, 1884.

"It is further ordered, that the defendant Clinton B. Fisk be and he is hereby directed and required to attend personally on the 14th day of March, 1884, before the honorable Addison Brown, one of the judges of this court, at a stated term thereof, at his chambers in the post-office building, in said city of New York, at eleven o'clock in the forenoon of that day; then and there, and on such other days as may be designated, to be examined and his testimony and deposition taken and continued as a party before trial, pursuant to section 870, *et seq.*, of the Code of Civil Procedure, and for the purposes mentioned in said order of January 12, 1883, and February 12, 1884, heretofore made in this action."

The defendant appeared before the court in pursuance of this order, and stating that he was advised by counsel that the court had no jurisdiction to require him to answer in this manner to the questions propounded to him by the counsel for plaintiff, he refused to do so. For this, on further proceeding, he was held by the court to be in contempt, and fined \$500, and committed to the custody of the marshal until it was paid. It is to be relieved of this imprisonment that he prays here the writ of *habeas corpus*.

The jurisdiction of this court is always challenged in cases of this general character, and often successfully. There can be no doubt of the proposition that the exercise of the power of punishment for contempt of their orders, by courts of general jurisdiction, is not subject to review by writ of error or appeal to this court. Nor is there, in the system of federal jurisprudence, any relief against such orders, when the court has authority to make them, except through the court making the order, or possibly by the exercise of the pardoning power.

This principle has been uniformly held to be necessary to the protection of the court from insults and oppressions while in the ordinary exercise of its duties, and to enable it to

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enforce its judgments and orders necessary to the due administration of law and the protection of the rights of suitors.

When, however, a court of the United States undertakes by its process of contempt to punish a man for refusing to comply with an order which that court had no authority to make, the order itself being without jurisdiction, is void, and the order punishing for the contempt is equally void. It is well settled now, in the jurisprudence of this court that when the proceeding for contempt in such a case results in imprisonment, this court will, by its writ of *habeas corpus*, discharge the prisoner. It follows necessarily that on a suggestion by the prisoner that, for the reason mentioned, the order under which he is held is void, this court will, in the language of the statute, make "inquiry into the cause of the restraint of liberty" (*Sec. 752, Revised Statutes*).

That the case as made by the petitioner comes, for the purposes of this inquiry, within the jurisdiction of this court, under the principle above mentioned, is established by the analogous cases: *Ex parte Rowland and others* (104 U. S. R., 164); *Ex parte Lang* (18 Wall., 163).

But did the court transcend its jurisdiction in fining the petitioner for contempt? Or, rather, did it have the power to make the order requiring him to submit to the preliminary examination? For if it had that power it clearly could enforce obedience to the order by fine and imprisonment if necessary. The record of the entire proceeding in this branch of the case, both in the state court and the circuit court, is before us, and we are thus enabled to form an intelligent opinion on the question presented.

The power of the court to continue the examination of the defendant after the removal of the case into the court of the United States is asserted on two grounds: 1. That the order for his examination having been made by the supreme court of New York under its rightful jurisdiction, while the case was pending in it, is still a valid order partially executed, which accompanies the case into the circuit court, and that in

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that court it cannot be reconsidered, but must be enforced. 2. That if this be not a sound proposition, the circuit court made an independent order of its own for the examination of the defendant, which order is justified by the principle that the Code of Civil Procedure of New York, under which both orders were made, is a part of the law governing the courts of the United States sitting within that state.

We will inquire into the latter proposition first, for the points to be considered in it lie at the foundation of the other also.

The general doctrine that remedies whose foundations are statutes of the state are binding upon the courts of the United States within its limits is undoubted. This well known rule of the federal courts, founded on the act of 1789 (1 *U. S. Stat.*, 92; *Rev. Stat.*, sec. 721), that the laws of the several states, except when the constitution, treaties or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, was enlarged in 1872 by the provision found in section 914 of the revision. This enacts that "the practice, pleadings and forms and modes of proceeding in civil cases other than equity and admiralty causes in the circuit and district courts shall conform as near as may be to the practice, pleadings and forms and modes of proceedings existing at the time in like causes in the courts of record of the state within which such circuit or district courts are held, anything in the rules of courts to the contrary notwithstanding." In addition to this, it has been often decided in this court that in actions at law in the courts of the United States, the rules of evidence and the law of evidence generally of the states prevail in those courts.

The matter in question here occurred in the court below in regard to a common-law action. It was in regard to a method of procuring and using evidence, and it was a proceeding in a civil cause other than equity or admiralty. We entertain no doubt of the decision of the court of appeals of New York that it was a proceeding authorized by the statutes of

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New York, under which, in a New York court, defendant was bound to answer. The case as thus stated, is a strong one for the enforcement of this law in the courts of the United States (*Ex parte Boyd*, 105 U. S. R., 647). But the act of 1789, which made the laws of the states rules of decision, made an exception when it was "otherwise provided by the Constitution, treaties or statutes of the United States." The act of 1872 evidently contemplates the same exception by requiring the courts to conform to state practice as near as may be. No doubt it would be implied, as to any act of congress adopting state practice in general terms, that it should not be inconsistent with any express statute of the United States on the same subject. There are numerous acts of congress prescribing modes of procedure in the circuit and district courts of the United States at variance with laws of the states in which the courts are held. Among these are the modes of impaneling jurors, their qualifications, the number of challenges allowed to each party. Two chapters of the Revised Statutes (17 and 18), embracing sections 858 to 1042, inclusive, are devoted to the subjects of evidence and procedure alone.

The case before us is eminently one of evidence and procedure. The object of the orders is to procure evidence to be used on the trial of the case, and this object is effected by a proceeding peculiar to the courts of New York, resting alone on a statute of that state. There can be no doubt that if the proceeding here authorized is in conflict with any law of the United States, it is of no force in the courts of the United States. We think it may be added, further, in the same direction, that if congress has legislated on this subject and prescribed a definite rule for the government of its own courts, it is to that extent exclusive of any legislation of the states in the same matter. A striking illustration of this effect of an act of congress in prescribing rules of evidence is to be found in section 858 of the Revised Statutes, originally enacted in an appropriation bill in 1864, and the amendment

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to it passed in 1865. It now reads: "In the courts of the United States no witness shall be excluded in any action on account of color, or in any civil action because he is a party to or interested in the issue tried; provided, that in actions by or against executors, administrators or guardians, in which judgment may be rendered for or against them, neither party shall be allowed to testify against the other as to any transaction with or statement by the testator, intestate or ward, unless called to testify thereto by the opposite party, or required to testify thereto by the court."

This act of congress, when passed, made competent witnesses in the courts of the United States many millions of colored persons who were not competent by the laws of the states in which they lived, and probably as many more persons as parties to suits, or interested in the issues to be tried, who were excluded by the laws of the states. It has never been doubted that this statute is valid in all the courts of the United States, not only as to the introduction of persons of color and parties to suits; but, in the qualification made by the proviso where its language differs from provisions somewhat similar in state statutes, the act of congress, critically construed, has always been held to govern the court (*Monongahela Bank* agt. *Jacobus*, 109 *U. S. R.*, 272; *Potter* agt. *The Bank*, 102 *U. S. R.*, 163; *Page* agt. *Burnstein*, 102 *U. S. R.*, 664; *King* agt. *Worthington*, 104 *U. S. R.*, 44).

Coming to consider whether congress has enacted any law bearing on the question before us, we find the following sections of the Revised Statutes, in chapter 17, on evidence, which we here quote together:

"SEC. 861. The mode of proof in the trial of actions at common law shall be by oral testimony and examination of witnesses in open court, except as hereinafter provided."

"SEC. 863. The testimony of any witness may be taken in any civil cause, pending in a district or circuit court, by deposition *de bene esse*, when the witness lives at a greater distance from the place of trial than one hundred miles, or is bound on a voy-

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age to sea, or is about to go out of the United States, or out of the district in which the case is to be tried, and to a greater distance than one hundred miles from the place of trial, before the time of trial, or when he is ancient or infirm." The remainder of this section, and sections 864 and 865, are directory as to the officer before whom the deposition may be taken, the notice to the opposite party, and the manner of taking, testifying and returning the deposition to the court.

Sec. 866. In any case where it is necessary, in order to prevent a failure or delay of justice, any of the courts of the United States may grant a *didimus potestatum* to take depositions according to common usage; and any circuit court, upon application to it as a court of equity, may, according to the usages of chancery, direct depositions to be taken in *perpetuam rei memoriam*, if they relate to any matter that may be cognizable in any court of the United States."

Section 867 authorizes the courts of the United States, in their discretion, and according to the practice in the state courts, to admit evidence so taken; and sections 868, 869 and 870 prescribe the manner of taking such depositions, and of the use of the subpoena *duces tecum*, and how it may be obtained.

No one can examine these provisions for procuring testimony to be used in the courts of the United States and have any reasonable doubt that, so far as they apply, they were intended to provide a system to govern the practice, in that respect, in those courts. They are, in the first place, too complete, too far reaching, and too minute to admit of any other conclusion. But we have not only this inference from the character of the legislation, but it is enforced by the express language of the law in providing a defined mode of proof in those courts, and in specifying the only exceptions to that mode which shall be admitted. This mode is "by oral testimony and examination of witnesses, in open court, except as hereinafter provided."

Of course, the mode of producing testimony under the

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New York Code, which was applied to petitioner, is not oral testimony and examination of a witness in open court, within the meaning of this act of congress. This obviously means the production of the witness before the court at the time of the trial, and his oral examination then ; and it does not mean proof by reading depositions, though those depositions may have been taken before a judge of the court, or even in open court, at some other time than during the trial. They would not, in such case, be oral testimony. The exceptions to this section, which all relate to depositions, also show that proof by deposition cannot be within the rule, but belongs exclusively to the exceptions.

We come now to inquire if the testimony sought to be obtained from petitioner by this mode comes within the exception referred to in section 861. These exceptions relate to cases where it is admissible to take depositions *de bene esse* under section 863, or in *perpetuam rei memoriam* and under a *dedimus potestatum* under section 866. In the first of these the circumstances which authorize depositions to be taken in advance for use on the trial are mentioned with great particularity. They all have relation to conditions of the witness ; to residence more than a 100 miles from the court, or bound on a sea voyage, or as going out of the United States or out of the district, or more than a 100 miles from the place of trial before the time of trial, or an ancient or infirm witness. None of these things are suggested in regard to petitioner, nor were they thought of as a foundation of the order of the state court, or of the circuit court. The statute of New York, under which both courts acted, makes no such requirements as a condition to the examination of the party. It is a right which, if the judge may possibly refuse to grant, he is in that matter governed by none of the conditions on which the depositions may be taken under the act of congress.

Nor does the case come within the principle or profess to be grounded on the power conferred by section 866, which is another exception to the rule established by section 861. It

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is not according to common usage to call a party in advance of the trial at law, and subject him to all the skill of opposing counsel to extract something which he may then use or not, as it suits his purposes. This is a very special usage, dependent wholly upon the New York statute. Nor is it in any manner made to appear that this examination was necessary in order to prevent a delay or failure of justice in any of the courts of the United States," nor is any such proposition the foundation of the court's action.

These are the exceptions which the statute provides to its positive rule that the mode of trial in actions at law shall be by oral testimony and examination of witnesses in open court. They are the only exceptions thereafter provided. Does the rule admit of others? Can its language be so construed? On the contrary, its purpose is clear to provide a mode of proof in trials at law to the exclusion of all other modes of proof; and because the rigidity of the rule may, in some cases, work a hardship, it makes exceptions of such cases as it recognizes to be entitled to another rule, and it provides that rule for those cases. Under one or the other all cases must come. Every action at law in a court of the United States must be governed by the rule, or by the exceptions which the statute provides. There is no place for exceptions made by state statutes. The court is not at liberty to adopt them, or to require a party to conform to them. It has no power to subject a party to such an examination as this. Not only is no such power conferred, but it is prohibited by the plain language and the equally plain purpose of the acts of congress, and especially the chapter on evidence of the revision. The New York statute would, if in force, repeal or supersede the act of congress.

It does not require much deliberation to see that if the acts of congress forbid the use of this kind of testimony in the courts of the United States, no order for taking it made in the state court while the case was pending in that court, with a view to its use on a trial there, can change the law of evi-

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dence in the federal court. Without deciding now, for the question is not before us, whether the testimony actually given under that order and transmitted with the record of the case to the circuit court can be used when the trial takes place, we are well satisfied that the latter court cannot enforce the unexecuted order of the state court to procure evidence which, by the act of congress, is forbidden to be introduced on the trial if it should be so taken.

The provision of section 4 of the act of March 3, 1875 (18 *U. S. St.*, 470), declares orders of the state court in a case afterwards removed, to be in force until dissolved or modified by the circuit court. This fully recognizes the power of the latter court over such orders. And it was not intended to enact that an order made in the state court which affected or might affect the mode of trial yet to be had, could change or modify the express direction of an act of congress on that subject. Nor does the language of the court in *Duncan agt. Geghan* (101 *U. S. R.*, 810) go so far. When it is there said that "the circuit court has no more power over what was done before the removal than the state court would have had if the suit had remained," it is in effect affirmed that it has at least that much power. There can be no doubt that on a proper showing before the state court it could have discharged the order for this examination or suspended its further execution. In acting on such a motion as this it would have been governed by the laws of the state of New York. In deciding whether it would continue the execution of this order or decline to execute it further the circuit court was governed by the federal law. If the law governing the circuit court gave it no power to make or continue this examination, but in fact forbid it, then it could not enforce the order.

The petitioner having removed his case into the circuit court has a right to have its further progress governed by the law of the latter court, and not by that of the court from which it was removed; and if one of the advantages of this removal was an escape from this examination, he has a

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right to that benefit if his case was rightfully removed. This precise point is decided, and in regard to this very question of the differing rules of evidence prevailing in the state and federal courts in *King agt. Worthington* (104 U. S. R., 44). In that case, after it had been once heard on appeal in the supreme court of Illinois, it was removed into the circuit court of the United States. The supreme court had reversed the judgment of the inferior court because, among other things, the evidence of witnesses had been received whom that court held to be incompetent.

On the trial in the circuit court they were held to be competent and admitted to testify, notwithstanding the decision of the supreme court of the state, on the ground that section 858 of the Revised Statutes of the United States, already copied in this opinion, made them competent, and, although it differed in that respect from the statute of Illinois on the same subject, it must prevail in the circuit court.

It was strongly urged here that this was error, and as to that case the decision of the Illinois court, made while it was rightfully before it, should control. But this court held otherwise, and said: "The federal court was bound to deal with the case according to the rules of practice and evidence prescribed by the acts of congress. If the case is properly removed the party removing it is entitled to any advantage which the practice and jurisprudence of the federal courts give him." The circuit court was, therefore, without authority to make the orders for the examination of petitioner in this case, and equally without authority to enforce these orders by process for contempt. Its order fining him for contempt, and committing him to the custody of the marshal, was without jurisdiction and void, and the prisoner is entitled to his release. It is supposed that the announcement of the judgment of the court that he is entitled to the writ will render its issue unnecessary. If it shall prove otherwise, the writ will be issued on application to the clerk.

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SUPREME COURT.

ABRAHAM KAUFMAN, as administrator, &c., agt. FELIX
HERZFELD and another.

*Code of Civil Procedure, section 972—Examination of party before trial—
Requirements of affidavit to procure order.*

The affidavit required to procure an order for the examination of a party before trial should state the nature of the action, and the substance of the cause of action, and of the judgment demanded therein. An affidavit which does not truly contain these requirements is insufficient.

Where the affidavit of the plaintiff only showed that he was ignorant as to whether he had a cause of action:

Held, that such want of knowledge on his part is no justification for the order. He should know before commencing his action the true cause thereof, and its substance should be set out.

Special Term, March, 1885.

MOTION to vacate an order made for the examination of the defendants. The deposition being needed, as is claimed on the plaintiff's behalf, to enable his attorneys to prepare a complaint in the action, which was commenced by the service of a summons.

Lauterbach & Spingarn, for motion.

Kaufman & Saunders, opposed.

VAN VORST, J. — The second subdivision of section 872 of the Code, provides that the affidavit to procure an order for such examination should state the nature of the action, and the substance of the cause of action, and of the judgment demanded therein.

The affidavit used on this occasion does not truly contain these requirements. It is left indeterminate whether the plaintiff proceeds upon the breach of a contract or for a conversion of the shares of stock. The affidavit does not in terms

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show that any contract between the intestate and the defendants had been broken, or that there has been a conversion of the shares purchased by the defendants for the intestate. There is no necessary implication arising from the facts stated in the affidavit that the defendants have done, or refused to do, anything which would give the plaintiff, as administrator, &c., a cause of action against the defendants.

The defendants, who are brokers, purchased certain shares of stock for the intestate, a part of which they afterwards sold by his direction. The prices at which the stock was sold they reported to the intestate, who afterwards paid to the defendant in full their account rendered for the purchase of the shares which the defendants reported they had in their possession for him. After the death of the intestate the plaintiff as administrator, &c., demanded the shares, and the defendants tendered them certificates for the number of shares claimed to have been purchased, bearing date the 21st day of October, 1884. The shares of stock purchased for the account of the intestate were bought or ordered to be bought in May, 1881. These shares were refused by the plaintiff. The plaintiff in his affidavit avers his ignorance as to whether the defendants purchased any shares of stock for the decedent, or whether they sold him shares of their own. They are ignorant as to whether the defendants sold and converted the decedent's shares, or whether they used them in their own business as their own, and is therefore unable to frame a complaint. In other words the plaintiff is ignorant as to whether he has a cause of action. But such want of knowledge on his part is no justification for the order in question. He should know before commencing his action the true cause thereof, and its substance should be set out. The mere fact that the defendants, upon the plaintiff's request, delivered to him shares of stock, the certificate of which bore a recent date, does not show either that the defendant had converted the decedent's shares, or that they did not have at all times in their possession sufficient shares of the stock in question to answer the

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demand of the decedent in his lifetime, or the plaintiff after his death.

Unless there was an express agreement that the defendants would hold the decedent's shares for him, a sale thereof, if they still had remaining in their possession a sufficient number of shares to replace the decedent's shares when demanded, the defendants would not be liable for any damages (*Zaussig* agt. *Hart*, 58 *N. Y.*, 429; *Levy* agt. *Loeb*, 85 *N. Y.*, 365).

The latter case does not conflict with the former on this point. The defendants may have had the decedent's shares standing in their own name, the same being so placed after they had purchased the same for him, they being entitled to hold the same for the sum remaining unpaid thereon, and upon the plaintiff's request transferred the same and obtained a new certificate therefor. In the absence of any allegation to the contrary it is not necessary or proper to indulge in an implication of either breach of duty or positive wrong on the defendants' part. Such implication can only arise, when the facts stated give rise to such an implication necessarily, and that is not this case. I have not deemed it necessary to consider the defendants' affidavit which was submitted on the motion which of itself dispels such implication, but have considered the plaintiff's affidavit exclusively.

The motion to vacate the order is granted.

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N. Y. COMMON PLEAS.

ANNIE ROSENTHAL agt. SOLOMON M. GROUSE.

District courts — Orders in — Attachment — Appeal — Code of Civil Procedure, sections 2917, 3211 — Manner of granting attachments in district courts — No appeal lies from an order of a district court refusing to vacate an attachment — Conflicting provisions of the Code of Civil Procedure.

The proceedings in a district court incident to the application for the granting and the execution of the warrant of attachment, and the duties of the justice and the clerk with respect to those proceedings, are now the same as are prescribed by the district court act; but if we wish to ascertain when and for what causes an attachment may be granted, for what reason it may be dissolved, and what effect upon the action will be produced by the vacating of the attachment, we must look to article 4 of the Code of Civil Procedure.

By section 2917 of the Code of Civil Procedure the attachment is now only a provisional remedy, and an error of the justice in regard to such a remedy will not cause the reversal of the judgment if the action were properly decided upon its merits.

At present there is no remedy for a party aggrieved if a district court errs in upholding or in vacating a provisional remedy. The decision of the justice cannot be reviewed on appeal (*This is adverse to Lang agt. Marks, 65 How., 127.*)

The provisions of section 3210 and of 3211 of the Code of Civil Procedure in relation to provisional remedies in the district civil courts, are in conflict.

General Term, April, 1885.

Before DALY, C. J., and VAN HOESEN, J.

DEFENDANT appeals from a judgment rendered in favor of the plaintiff in the fifth district court, and also from an order denying a motion made by the defendant to vacate a warrant of attachment issued against the property of the defendant.

Blumensteil & Hirsch, for defendant, contended that the question whether the attachment was properly issued may be presented on appeal, and the judgment may be reversed, for

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error in issuing the attachment (*Citing Lang agt. Marks, 65 How., 127*).

H. Joseph, for plaintiff

VAN HORNEN, J. — Section 3210 of the Code provides that article 3 of title 2 of chapter 19 shall apply to the district courts, except as otherwise provided in section 3211. Article 3 relates to arrests in actions in justices' courts, and embraces all sections from 2894 to 2904, both included. Section 3211 then provides that article 3 shall not apply to arrests in actions in district courts. Here we have two sections, one providing that article 3 shall apply, and the other that it shall not. Surely the attention of the legislature should be called to these conflicting provisions. Section 3210 also provides that article 4 of title 2 of chapter 19 shall apply to the district courts, except as otherwise provided in section 3211. Article 4 relates to attachments in justices' courts, and embraces all sections from 2905 to 2918, both included. Section 3211 provides that the manner of applying for, of granting and of executing an attachment and the proceedings thereupon and with respect thereto, as prescribed by article 4, title 2, chapter 19, sections 2905-2918, shall be subject to what? To those unrepealed statutes specially applicable to district courts that prescribe the duties of justices and of clerks, and that regulate "the mode of transacting business" in an action in the district courts. I have refrained from commenting on a ludicrous blunder in grammar to be found in the last clause of the section.

Everyone can see that the language of section 3211 is ill chosen and obscure, and it is not easy, therefore, to ascertain the meaning of the codifier. In his note to that section, Mr. Throop says that he intended "to abolish a warrant of arrest and an attachment as process for the commencement of an action, and to substitute the appropriate provisional remedies therefor, as provided in chapter 19." With respect to orders

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of arrest, Mr. Throop has succeeded in frustrating his own intention, for, as I have already said, section 3211 provides expressly that chapter 19 shall not apply to orders of arrest in district courts. With respect to warrants of attachment he has, I believe, in a measure succeeded in carrying out his purpose. As was said in *Sullivan agt. Presbee* (9 *Daly*, 552), article 4, title 2, chapter 19 prescribes the cases in which an attachment may be granted, but the method of applying for a warrant and the duties that fall upon the justice and the clerk respectively remain the same as they were under the district court act of 1857, which is a statute specially applicable to district courts, and which has never been repealed.

The proceedings incident to the application for the granting and the execution of the warrant of attachment, and the duties of the justice and the clerk with respect to those proceedings, are now the same as are prescribed by the district court act; but if we wish to ascertain when and for what causes an attachment may be granted, for what reason it may be dissolved, and what effect upon the action will be produced by the vacating of the attachment, we must look to article 4. Section 2917 expressly declares that "vacating the attachment does not affect the jurisdiction of the justice to hear and determine the action where the defendant has appeared generally in the action, or where the summons was personally served upon him, or where he is indebted jointly with another defendant who has appeared, or been personally served." In short, the attachment is now only a provisional remedy, and an error of the justice in regard to such a remedy ought not to cause the reversal of the judgment, if the action were properly decided upon its merits.

In the case of *Lang agt. Marks* (65 *How. Pr.*, 127), the court said that the Code of Civil Procedure had made "no change whatever in any respect in the district court act, except to require that an action should always be commenced by summons." It is evident that when the decision in *Lang agt. Marks* was made, the attention of the court had not been called

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to the case of *Sullivan agt. Presbee* (9 *Daly*, 552). The court, in *Sullivan agt. Presbee*, had examined the sections that were under consideration in *Lang agt. Marks*, and had held that section 3211 did no more than prescribe the manner of suing out and executing a warrant of attachment. As part of the manner of granting an attachment, it provided that the justice and the clerk should each continue to write his name on the warrant in the place and in the way that the district court act had prescribed. These formalities it may have been of small consequence to preserve, but that was not the affair of the courts; the legislature had seen fit to adopt the confused language of the codifier and the duty was devolved upon the court of construing it. But in everything, save regulating the manner of issuing and executing warrants of attachments, the sections of article 4, title 2, chapter 19, were to apply. Indeed, in *Lang agt. Marks*, the court holds that section 2917 does apply. If that be conceded the error in the decision of *Lang agt. Marks* is manifest, for there can be no doubt that the section last named does radically and entirely change the practice that prevailed under the district court act. Under that act the setting aside of the attachment necessitated the dismissal of the action. The attachment was original process, and if that were set aside the suit fell with it, for the defendant could not be held to answer a process that had been annulled and held for naught. In *Lang agt. Marks* the court said, that because the manner of obtaining and executing the warrant was preserved it followed necessarily that the effect of vacating the warrant must be the same as it had been under the district court act. This did not follow. Section 2917 expressly provides against such a result, and declares that, notwithstanding the dissolving of the attachment, the justice shall proceed to try the issues and to render judgment. On the ground that *Lang agt. Marks* overlooked the decision of this court in *Sullivan agt. Presbee*, as well as on the ground that it was erroneously decided, we cannot regard it as an authority to be followed.

If, under section 2917, the warrant is only a provisional

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remedy, the disposition of which does not involve the merits of the action or the process by which the defendant is brought to the court, it cannot be said that the judgment is erroneous, though the justice may have erred in upholding the attachment. If there were no error in the judgment in the district court, there can be no error in the judgment when it is brought into the appellate court for review. We find no error in the judgment, for the defendant in his answer admits that he owes the claim upon which the suit was brought. The judgment must, therefore, be affirmed.

It may be asked, what remedy has the party aggrieved if a district court errs in upholding or in vacating a provisional remedy? At present there is no remedy; there is a *casus omnisus*. Just as the legislature, in 1882, found it necessary to amend section 3191 of the Code so as to provide for a review by this court of orders of the marine court that "granted, refused, continued or modified a provisional remedy," so now it is indispensable that there should be further legislation if there is to be an appeal from the orders of the district courts with respect to provisional remedies. As, prior to the Code of Civil Procedure, there was no such thing as a provisional remedy in a district court, it is easy to see why no provision has been made for an appeal in such a case as this.

We cannot disturb the action of the district court in refusing to set aside the attachment.

In the Estate of James Tilby, deceased.

SURROGATE'S COURT.

In the Estate of JAMES TILBY, deceased.

Surrogate — Appeal — Power of the surrogate to extend the time within which to make a case on appeal — Code of Civil Procedure, sections 2572, 2577.

The requirements of sections 2572 and 2577 of the Code of Civil Procedure and the requirements of Rules 32 and 33 of the General Rules of Practice, are entirely independent of each other, and the surrogate may at any time after the entry of the decree or order sought to be reviewed, extend the time for making and serving a case, even though the appeal has not been perfected, provided that the time for perfecting it is as yet unexpired.

New York county, April, 1885.

ROLLINS, S. — This is an application for an extension of time within which to make a case on appeal. It is urged in opposition that the surrogate is powerless to grant it because of the fact that the security required by section 2577 of the Code of Civil Procedure has not been filed, and that accordingly the appeal is for no purpose effectual. It is true that, for the reason specified, the appeal is as yet incomplete, but the time within which it may be perfected has not yet expired.

Rule 32 of the General Rules of Practice, provides that on appeal from this court a case must be made and served within ten days after service of a copy of the decree or order appealed from; but it also provides that further time may be allowed by the surrogate.

Rule 33 declares that if a party omits to make a case within the time limited by Rule 32 (that is, within ten days, plus such further time, if any, as may have been allowed) he shall be deemed to have waived his right thereto.

Now, if the opposition to this application is well founded, and the time for making a case cannot be enlarged while the appeal is still unperfected, it follows that the appellant must, at the peril of utterly losing his right for a review of such

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alleged errors as took place at the trial, but are not part of the record, either prepare and serve a case within precisely ten days or within the ten days file security. No such result can have been contemplated by the statute regulating the procedure on appeal, or by the rules of practice above cited.

Section 2572 of the Code provides that an appeal by a party must be taken within thirty days after service of the decree or order from which the appeal is taken.

Section 2577, as has been stated already, requires that an undertaking shall be given before such appeal can be made effectual.

I think that these requirements and the requirements of the rules are entirely independent of each other, and that the surrogate may at any time after the entry of the decree or order sought to be reviewed, extend the time for making and serving a case even though the appeal has not been perfected, provided that the time for perfecting it is as yet unexpired (*Salls agt. Butler*, 27 *How. Pr.*, 133).

Application granted.

SUPREME COURT.

HENRY HILTON agt. THE THIRTY-FOURTH STREET RAILROAD COMPANY.

ALFRED M. LOOMIS and others agt. THE SAME.

Street railroads — Necessary consents to the building of such road — Consent of the owners of one half in value of the property bounded on each street or portion of street necessary.

The constitutional and statutory provisions in reference to the construction and operation of street railroads makes it necessary to have the consent of the owners of one-half in value of the property bounded on each street or portion of a street upon which it is proposed to construct a railroad, and not merely the consent of the owners of one-half in value of the property bounded upon the whole of the route over which it is proposed to build the road.

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If that is not done, then the building of the road must be authorized by the commissioners appointed by the general term of the supreme court and by the general term itself.

As a railroad constructed in a public street without authority would be a public nuisance, the burden of proof is upon the defendant, to show that it has such authority.

New York Chambers, April, 1885.

Horace Russell, for plaintiff.

Wakeman & Latting, for defendant.

ANDREWS, J. — These are motions to continue injunctions restraining the defendant from constructing a surface railroad in Thirty-fourth street, in the city of New York, during the pendency of the actions.

The defendant is a corporation organized under chapter 252 of the Laws of 1884, for the purpose of constructing and operating a street surface railroad, the route of which, as stated in its certificate of incorporation, is to be from the foot of Forty-second street, at the Hudson river, through Forty-second street to the Tenth avenue; thence through Tenth avenue to Thirty-fourth street; thence through Thirty-fourth street to the East river; and also through Thirty-fourth street from Tenth avenue to the North river.

A resolution giving the consent of the common council to the construction of such a road upon said route was passed December 20, 1884, and having been returned by the mayor without his approval or objections thereto, became adopted on December 27, 1884, as provided by section 75 of chapter 410 of the Laws of 1882. Soon afterwards the defendant commenced work and was proceeding to construct a railroad upon that portion of said route lying between Sixth and Fifth and Fifth and Madison avenues, when these actions were commenced and the further prosecution of the work restrained by injunctions granted therein.

The plaintiffs are the owners of property fronting on

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Thirty-fourth street, between Sixth and Lexington avenues, and claim that their property will be greatly injured by the construction and operation of the defendant's proposed road, and, if such claim be well founded, can undoubtedly maintain these actions, if such construction and operation are not authorized by law. The construction and operation of street railroads in this state are provided for and regulated by section 18 of article 3 of the Constitution, and chapter 252 of the Laws of 1884. The portion of said section 18 applicable to the matter is as follows: "No law shall authorize the construction or operation of a street railroad except upon the condition that the consent of the owners of one-half in value of the property bounded on, and the consent also of the local authorities having the control of that portion of a street or highway upon which it is proposed to construct or operate such railroad be first obtained, or in case the consent of such property owners cannot be obtained, the general term of the supreme court, in the district in which it is proposed to be constructed, may, upon application, appoint three commissioners who shall determine, after a hearing of all parties interested, whether such railroad ought to be constructed or operated, and their determination, confirmed by the court, may be taken in lieu of the consent of the property owners."

This provision of the constitution is incorporated in said chapter 252 of the Laws of 1884, in which it is also provided that "for the purposes of this act the value of the property so bounded shall be ascertained and determined from the assessment-roll of the city or town in which such property is situated, confirmed or completed last before the local authorities shall have given their consent."

The defendant having become incorporated under said act, and having obtained the consent of the local authorities to the construction and operation of its proposed road, claims to have also obtained the requisite consents of property owners, while the plaintiffs insist that all the consents so obtained do not

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represent the one-half in value of the property, the consent of whose owners is made necessary by the constitution and statute aforesaid. Whether or not consents to the necessary amount have been obtained by the defendant cannot be determined by a mere arithmetical calculation, but depends upon the decision of several questions of law and fact, some of which are of considerable difficulty. The first question to be dealt with is whether it is necessary for the defendant to have the consents of the owners of one-half in value of the property bounded on each street or portion of street upon which it is proposed to construct the railroad, or whether the requirements of the constitution and the statute will be satisfied if the defendant has the consent of the owners of one-half in value of the property bounded upon the whole of the route over which it proposes to build its road.

The learned counsel for the defendant contends that the latter view is the correct one, but after a careful consideration of his argument I am not able to concur with him on this point. The constitution and the statute require the defendant to obtain "the consent, in writing, of the owners of one half in value of the property bounded on * * * that portion of a street or highway upon which it is proposed to construct or operate such railroad." The language here used is so clear and explicit as to make it difficult to argue about the matter at all. I do not see how there can be any well founded doubt as to the sense in which the words "street" and "highway" are used. Streets and highways are both roads, and for certain purposes every public street is a highway. As a rule, however, in law and in common understanding, based upon long continued usage, a "street" and a "highway" mean two different things. "Strictly, a street is a paved way or road, but the term is used for any way or road in a city or village" (*Brace agt. N. Y. Central R. R. Co.*, 27 *N. Y.*, 271). I have no doubt that the words "street" and "highway" have the same meaning respectively in the constitution that the former has in almost innumerable laws

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relating to cities and incorporated villages, and that the latter has in the body of laws of this state known as the "highway acts." Nor is there any ambiguity in the phrase "that portion of a street or highway."

It is stated by counsel that when this amendment of the constitution was originally submitted to the commission, it contained the words "each street," and that the words "a street" were substituted therefor, and he infers that such change has some significance. It seems to me, however, that "a street" means the same as "any street," and that the phrase "that portion of a street or highway" has the same meaning and effect as the phrase "that portion of each street or highway" would have had if the latter had been employed.

I think that the plain and unequivocal meaning of the constitution and the act of 1884 is, that when it is proposed to construct a surface railroad along the whole length of a street, or along the whole length of several streets, it is necessary to first obtain the consent in writing of the owners of one-half in value of the property bounded upon the whole length of such street, or upon each of said streets, as the case may be; and when it is proposed to construct a surface railroad upon a portion of a street, or upon portions of several streets, it is necessary to first obtain the consent in writing of the owners of one-half in value of the property bounded upon such portion of the one street, or upon such portions of each street as is, or are, to be built upon. Confirmation of this view of the meaning of the constitution and the statute, if confirmation were needed, could be found by a consideration of one of the evils which undoubtedly led to the adoption of the constitutional amendment in question, and which it was intended to remedy. It was formerly claimed that the common council of the city of New York possessed the power to authorize the construction of surface railroads upon the streets of that city, and in the year 1850, and the several years immediately subsequent thereto, ordinances were adopted authorizing private individuals to construct a number of such roads, and,

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among others, one whose route was partly through Broadway. A protracted litigation followed, and it was finally decided by the court of appeals that the common council did not possess this power (*Milbau agt. Sharp*, 27 *N. Y.*, 612). Pending this litigation the legislature passed an act (*chapter 140, Laws of 1854*) forbidding the common councils of cities to permit railroads to be constructed within their limits without the consent of a majority in interest of the owners of property upon the streets in which the railroads were to be constructed, but also confirming grants already made.

In 1860 another law was passed (*chap. 10*), which provided that no railroad should be constructed upon any of the streets of the city of New York except under the authority of the legislature, to be thereafter granted; and at the same session a number of acts were passed authorizing the construction of railroads in said city (*Laws of 1860, chaps. 511, 512, 513, 514 and 515*).

Further litigation followed, the city as well as property owners contesting the right of the legislature to pass these laws; but the validity of such acts was finally established by the court of last resort (*People agt. Kerr*, 27 *N. Y.*, 188). This decision was rendered in 1863, and from that time until the adoption of the constitutional amendment, which took effect on January 1, 1875, the legislature continued to exercise exclusive control over the construction of railroads in said city. There can be no reasonable doubt that the oft repeated remonstrances of owners of property in the city of New York, who felt aggrieved by the injury done, or which it was feared would be done, to their property by the construction of some of these roads, was largely instrumental in securing the adoption of such amendment of the constitution, which was introduced by an ex-mayor of that city (*Journal of Constitutional Commission*, pp. 80 and 87).

Now, an examination of the resolutions of the common council, and of the acts of the legislature authorizing the construction of railroads in the city of New York, and of the

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cases in which the numerous and bitter legal contests in regard to such construction are reported, shows that while property owners had a general ground of complaint, because of the number and character of the roads so authorized, they had also a special and particular grievance, which was this: The building of a road might be authorized which was to run through portions of many different streets, and the owners of property on most of such streets might desire to have the road built. The owners of property on one street might, however, consider that the construction of the road through that street would be ruinous to their property, and it might be entirely practicable to construct the road through the other streets without going through that one street. Still, no matter how injurious to their property or how unnecessary that the road should pass through that particular street, the owners of property upon it were absolutely without remedy if the promoters of the project saw fit to insist that such street should be included in the route. It may well be that it was this special, and in some cases almost unendurable grievance, which led to the adoption of the constitutional amendment in its present form, and that it was framed, as it is, with the express purpose and design that the owners of property upon every street through which it is proposed to construct a railroad, shall, at least, have a right to be heard before the railroad is built. In other words, if it were proposed to construct a railroad in Fifth avenue or Broadway, in the city of New York, that the owners of property on each of those streets should have the right to determine, in the first instance, whether the road should be built, and not the owners of property on Twelfth avenue or avenue C or some other remote street which might be included in the "route" of the proposed road.

The objection that, if this view be correct, the owners of property on a single street, or even a single block, might prevent the construction of a railroad necessary for the convenience of the general public, has no force. The constitution

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and the act of 1884 both provide that if the requisite consents of owners of property cannot be obtained the general term of the supreme court shall appoint three commissioners, who shall, after hearing all parties, decide whether the road shall be built, and their determination, when confirmed by the court, is final. Thirty-fourth street, Tenth avenue and Forty-second street, the route of the defendant's proposed road, are separate streets, laid out as such upon the map of the city filed by the commissioners appointed under chapter 115 of the Laws of 1807, and, in my opinion, before such road can be lawfully constructed the consent of the owners of one-half in value of the property bounded upon that portion of each of those streets upon which it is proposed to build the road, must first be obtained; or the building of the road must be authorized by commissioners appointed by the general term of the supreme court and by the general term itself.

The next question to be considered is how the value of the property is to be ascertained. The constitution requires the "consent of the owners of one-half in value," which I suppose must mean the actual value. The statute, doubtless with the view of avoiding the great difficulties that would arise in attempting to obtain a valuation of each piece of property, provides that the value shall be ascertained and determined from the assessment-roll of the city or town in which the property is situated, confirmed or completed last before the local authorities shall have given their consent.

If property upon a street is assessed fairly and uniformly it will, of course, make no difference in the result whether the consents obtained are of the owners of one-half in actual value or one-half in assessed value. No point is raised in this case as to any irregularity of assessment, and it is not necessary for me to consider whether the provisions of the constitution and statute are in conflict. A question is raised, however, with reference to property which is exempt from taxation.

Formerly property exempt from taxation was not valued upon the books provided for in chapter 302 of the Laws of

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1859, called "the annual record of the assessed valuation of real and personal estate," of which the assessment-rolls are copies. The practice was changed in this respect a few years since, owing to a difficulty which arose in regard to assessments for local improvements. Section 7 of chapter 526 of the Laws of 1840 provided, in substance, that no assessment for any local improvement should be imposed upon real property to an amount more than one-half the value of such property, as valued by the ward assessors (now deputy tax commissioners). Churches and other property exempt from taxation, and therefore not valued on the tax books, were liable to be and were assessed for local improvements. Many such assessments were vacated by the courts, because, as there was no valuation at all, it was impossible to say that the assessment did not exceed the limits of one-half the value as prescribed by said act of 1840.

To remedy this difficulty the practice was instituted, and now continues, of valuing all property exempt from taxation, and such values appear upon the tax books. It was objected that the tax officers had no power to value property except for the purpose of taxation, but such objections have been overruled by the courts, and it has been decided that such valuations furnish the criterion for determining whether an assessment for a local improvement exceeds one-half the value fixed as required by said act of 1840 (*Matter of St. Mark's Church*, 11 *Hun*, 381; 74 *N. Y.*, 610). Now it is clear that the method pursued in making up the gross valuations of property upon a street must be the same as that followed in calculating the amounts of the consents of the owners. That is to say, it will not do to take the assessed value of a particular piece of property in calculating the gross valuations, and then value the same property half as much again in determining the amount of the consents; the methods pursued must be consistent, and either the assessed or the estimated value must be used on both sides of the account. In the present case, this course has been followed with reference to property

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liable to taxation. The valuations have been taken from the tax books and the same valuations have been used in making up the gross amount of property and the consents of owners. This makes it necessary that the same method should be pursued with reference to property exempt from taxation. It will not do to take assessed valuations of taxable property and estimated valuations of exempt property. The valuations of the exempt property must be taken from the tax books and those valuations must be used both in making up the gross amounts of property and in reckoning up the consents of owners. If the views hereinbefore expressed are correct the defendant has not obtained consents sufficient to authorize it to construct a railroad in Thirty-fourth street. As a railroad in a public street, constructed without authority of law, would be a public nuisance, the burden of proof is upon the defendant to show that it has such authority.

A great number of consents were produced in court, and I have been furnished with statements and tabulations, sworn and unsworn, purporting to show the gross valuations of all the property bounded on Thirty-fourth street, and the amount in value of the consents given by owners of property on that street to the construction of the proposed road. The statements submitted on behalf of the defendant have been prepared on different bases, but, as I understand it, one basis is to take the values of taxable and exempt property from the tax books both in making up the gross valuations and the amount of the consents of owners, which basis, as above stated, I regard as the correct one. According to one of these statements the excess of consents over one-half the value of the property is \$295,800, while according to a later statement such excess is \$93,800.

Upon its own figures, therefore, the defendant fails to show the requisite amount of consents; for, to reach the above results, it includes the property of the New York Institution for the Blind, valued at \$650,000, and many pieces of property valued at sums aggregating a large amount, the lessees only of which have signed consents, neither of which, upon the

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papers before me, can possibly be included in making up the amount of such consents.

A paper was produced in court, signed "D. L. Suydam, V. P.," purporting to be a consent on behalf of such institution for the blind; but since the hearing I have been furnished with what purports to be, and, as I understand, is conceded by the defendants' counsel to be, a copy of a resolution adopted on February 4, 1885, at a meeting of the board governing such institution, in which it is stated that the signature of Mr. Suydam, as vice-president, to the application of the defendant for permission to lay its tracks in Thirty-fourth street was unauthorized by the board. With this resolution before me, and with no evidence whatever as to what authority Mr. Suydam had in the premises, except that he was vice-president, and that the president was absent, and the burden of proof being on the defendant, it is impossible for me to treat the paper produced as the consent of the institution in question. Nor can the consents given by lessees be received. The constitution and the statute require the consents of the owners of the property; and while, for some purposes, a lessee may have been held to represent the owner, or to have power to bind the owner, it does not seem to me that such decisions can have any application to the present case. An interpretation of the constitution, which would confer upon a lessee for a year, or a month, the power to give a valid consent to the construction of a railroad in front of the property leased, when the owner might consider that the railroad would seriously injure his property, is wholly inadmissible. Deducting the value of the property of the institution for the blind, and the consents given by lessees, and the amount of the consents of owners of property bounded on Thirty-fourth street falls far short of the requisite one-half in value. Quite a number of the consents of the owners of property bounded on Thirty-fourth street, between Lexington avenue and the East river, and Sixth avenue and the Tenth avenue, are given on condition that the defendant shall not lay new tracks in

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front of such property, or that the cars of the defendant shall be run only upon the existing tracks of the companies which are now operating railroads in those portions of Thirty-fourth street. The plaintiffs claim that these consents are worthless, on the ground that the constitution and statute do not provide for conditional consents, and that the right of the property owners is only to consent absolutely and unconditionally to the construction of a railroad in Thirty-fourth street, or not to consent at all. The plaintiff also claims that, at any rate, such consents to operate a railroad in certain parts of that street cannot be regarded as consents to construct a railroad in another part of the same street.

The plaintiffs also claim that the defendants cannot lay new tracks in Thirty-fourth street, between Lexington avenue and the East river, nor between the Sixth and Tenth avenues, without the consent of such other companies, and this claim is sustained by the recent decision of Mr. justice INGRAHAM in the case of the Forty-second Street and Grand Street Railroad Company against this defendant. Such consent has not been obtained, nor has the defendant secured in any way the right to run its cars over the tracks of the old companies. The plaintiff insists that, under these circumstances, the sole purpose of the defendant, at present, is to construct a railroad in Thirty-fourth street, between Lexington and Sixth avenues, and that it cannot lawfully do this until it has obtained the right to construct or operate a railroad over the rest of its proposed route.

The questions raised by the plaintiff as to the validity and effect of conditional and partial consents, and as to the right of the defendant to construct a road upon a part of Thirty-fourth street without first obtaining from the old companies the right to construct or operate its road over the other portions of that street, are serious ones; but as, without regard to these questions, the defendant has not obtained the requisite amount of consents, it is not necessary to pass upon them now.

The motions to continue the injunctions during the pendency of the litigations must be granted.

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SUPREME COURT.

SIGMUND J. SELIGMAN agt. JONAS SONNEBORN.

Specific performance of contract on sale of real estate — Validity of title — Foreclosure of mortgage, and publication of summons against mortgagor and owner of the fee who has disappeared. — Proof of facts of complaint in partition — Sufficiency of proof of death of owner of the fee — Presumption of life and death.

Claus Bulwinkel, the owner of four lots on Fifth avenue, New York city, disappeared, having made a mortgage thereon which, on the 22d day of August, 1862, was foreclosed and the summons published against him. The lots were sold under a judgment for their sale in this action. Six years thereafter the purchasers, through proceedings, in foreclosure of said mortgage by an advertisement under the statute, sold two of the lots, and they bringing more than sufficient to pay the mortgage, the other two lots now in question were not sold, but a quit-claim deed thereof was given to the heirs of said Bulwinkel.

One of these heirs thereupon commenced an action in partition alleging that on or about the day of 1863, Claus Bulwinkel departed this life, and stating who were his heirs, but on the trial or hearing no attempt was made to prove the death, or that the said parties were the heirs. The judgment, however, treated the same as proved, and at the sale by a referee the plaintiff became a purchaser and took title, all the parties to the partition action also conveying their rights and interests to the plaintiff. On the 23d day of July, 1863, the plaintiff contracted to sell the two lots to the defendant for \$22,500.

The defendant refused to take title, because Claus Bulwinkel had not been made a party to the action, or appeared therein; that there was no proof that he was dead, or died intestate, or that the parties in said partition suit were seized of the lots, and that the court acquired no jurisdiction over Claus Bulwinkel, and that the sale to plaintiff was void.

Evidence of the omitted facts in the partition suit was given on the trial of this action, among other things, that Claus Bulwinkel left New York city in the year 1860. In November, 1862, his relatives read an account of the massacre of emigrants in the south-west August 9, 1862, and among the killed a gentleman from New York city describing said Bulwinkel, the relatives testifying that they had not heard from him and that it was the common report that he had been killed by the Indians and was dead:

Held, that by the statute he was presumed to be dead on the 9th day of August, 1869, seven years from the date of his reported death.

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That the evidence was sufficient to prove the particular date of death to be August 9, 1863, seven years before, and that he did not live during seven years (*Citing and commenting on the cases and what facts are sufficient proof of death at a particular time*).

That the foreclosure action was commenced at a time when he was dead and had been buried thirteen days; that the judgment entered was void; that no title passed under it, the same being in the heirs.

That the partition suit was begun seven years after Claus Bulwinkel would be presumed to be dead by the statute, independent of the evidence of the direct proof of his death.

That the defect of evidence might have been supplied in that suit by opening the proceedings, but that the heirs being all of full age, and having, on the 5th day of January, 1873, conveyed by deed to the plaintiff all their right, title and interest in the lots, he had a good title, independent of the partition sale, and the defendant was bound to take it.

GEORGE F. LANGBEIN, *Referee*. — This action is brought to compel performance of a contract of sale of two lots of land on the westerly side of Fifth avenue fifty feet and five inches from the north-westerly corner of One Hundred and Fourteenth street, in the city of New York, for which defendant agreed to pay \$22,500. He refuses to make the payment because he says the plaintiff's title is derived from a referee's deed under a partition sale in an action brought by Albert Merhlahn and wife against Henry Bohlken and others; that the lots belonged to one Claus Bulwinkel, and he was not made a party to the action, nor did he appear therein. The defendant further claims that there was no proof in that action that Claus Bulwinkel was dead, or had died intestate, or that the parties to the action were seized of said lots; that the court acquired no jurisdiction over Claus Bulwinkel, and that the sale was void and gave no title to the plaintiff as purchaser. It appears from the documentary evidence and proof herein that Claus Bulwinkel became the owner of the two lots in fee, by deed in the year 1858.

On the 15th day of August, in the year 1860, he made a mortgage thereon, including a lot on One Hundred and

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Thirteenth street and Fifth avenue, for \$6,000, to John C. Cheesman, payable August 1, 1861. On the 22d day of August, 1862, John C. Cheesman commenced a foreclosure suit of his mortgage against said Claus Bulwinkel. No other person was named as a party to the action, and publication of the summons as for service upon him was ordered September 9, 1862. On the 18th day of November, 1862, John C. Cheesman having died, the action was by order continued in the name of the executrix and executor of his last will and testament, and next day the referee made his report of the amount due on the mortgage. On the 20th day of November, 1862, a decree of sale was made, and on the 13th day of December, 1862, the lots were conveyed to the plaintiffs, the executrix and executor, who had bought them on the sale. About six years afterwards, on the 19th day of May, 1868, Martha K. Cheesman and Timothy Matlock Cheesman, executrix and sole surviving executor of John C. Cheesman, deceased aforesaid, published notice of sale of said two lots by them, including the two adjoining lots and the lot on One Hundred and Thirteenth street and Fifth avenue, at public auction on the 13th day of August, 1868, in proceedings to foreclose said mortgage by advertisement under the statute. The two adjoining lots and the One Hundred and Thirteenth street lot were sold to Terrence Farley for \$13,300; and this sum being more than sufficient to pay the mortgage on the four lots, the two lots in question were not sold and were considered released. On the 24th day of February, 1869, the said executrix and executor of Mr. Cheesman made a quit-claim deed to Gershe Bohlken, wife of Henry Bohlken, Dorethea Meislahn, wife of Albert Meislahn, John Meyer, Henrietta Barth, wife of August Barth, Augusta Van Axte and Matilda Van Axte, all of the city of New York, of said two lots, which was duly recorded. In this deed the two lots are described as distant fifty feet two and one-half inches from the north-west corner of One Hundred and Fourteenth street and Fifth avenue, and running

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northerly along the westerly side of Fifth avenue fifty feet eight and one-half inches, whereas the complaint describes them as fifty feet five inches from the north-west corner of Fifth avenue and One Hundred and Fourteenth street, and running northerly fifty feet six inches along the westerly side of Fifth avenue. No point as to this difference of description, however, has been made by the defendant upon the trial of this action.

It is not, however, stated who these grantees are. Gershe Bohlken and Dorethea Meislahn were given each one-third and the other grantees each one-twelfth. On the 12th day of September, 1871, Dorethea Meislahn filed her complaint against these parties to partition or sell the two lots among them, alleging that on or about the — day of —, 1862. Claus Bulwinkel departed this life intestate seized in fee of the two lots, describing them fifty feet two and one-half inches from the corner, and fifty feet eight and one-half inches along Fifth avenue as described in said quit-claim deed, and that he left him surviving Dorethea Meislahn and Gershe Bohlken, his sisters, John Meyer, his nephew, Henrietta Barth, Augusta Van Axte and Matilda Fink, his nieces, his only heirs-at-law.

It does not appear that any attempt was made to prove the death of Claus Bulwinkel, that he died intestate, or that said parties were his heirs. The plaintiff's attorney was a witness in open court, and was examined and testified as to other matters. There was no reference as to title, and no other or further evidence. The parties consented in writing to the sale of the property, which was acknowledged before a notary public and is annexed to the judgment-roll. The judgment is dated October 24, 1871, and states that on motion of plaintiff's counsel "judgment of this court is rendered that all the statements of the complaint in this action are true as therein stated," * * * "and that the parties to this action are seized in fee simple and possessed of the premises described in the complaint." The record of this partition suit produced in evidence on this trial discloses no such evidence.

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None of the parties were examined to prove that any of them were heirs of Claus Bulwinkel. It seems to have been conceded and sufficient because it was alleged in the complaint. None of the parties answered, excepting the defendants Fink and Van Axte, and they consented that their answers be stricken out. The lots are described as distant fifty feet ten and one-half inches from said corner, and running northerly on said westerly side of Fifth avenue fifty feet eight and one-half inches. A judgment for the sale of the lots was filed October 24, 1871, and they were sold by the referee December 11, 1871, who, on the 3d day of April, 1872, conveyed the same to the plaintiff Sigismund J. Seligman by the same description. All the said parties to said partition action also made a deed to the plaintiff conveying all their rights and interests in the lots, the description being fifty feet five and one-half inches from the north-west corner, and running northerty along the westerly side of Fifth avenue fifty feet five and one-half inches. But again, no objection is made by the defendant as to this second difference in description. This deed is dated January 5, 1872, and acknowledged by the various parties January 8 and April 2, 1872, and is recorded April 9, 1872.

On the 23d day of July, 1883, the plaintiff made the contract with the defendant, which the latter refused to perform and upon which the plaintiff brings this action. Evidence was given upon the trial of this action of the facts omitted in the partition suit. It was shown that Claus Bulwinkel had a grocery and liquor store at No. 374 Sixth avenue, south-east corner of Twenty-third street, New York city, whereon the well known Booth's theater was built. He left said city in the year 1860 without informing any of his relations that he was going away or where he was going to. One of his sisters, Gershe Bohlken, testified that until the year 1861 he resided in Monticello, Sullivan county, state of New York. He then again disappeared, and all knowledge of him was lost by his relations until the 25th day of November, 1862, when the

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"Brooklyn Daily Times" newspaper contained an article of the killing of Claus Bulwinkel by Indians in the overland route to California. The article is headed "More Indian massacres— Murder of emigrants on their way to the Salmon River Mines," and is from the St. Paul Press, November thirteenth, written by a correspondent of the Mankato Record, William H. Sargent, who left that place in May before for the said mines, and who wrote from Rat river, in Washington territory, August eleventh. This gentleman describes and gives a detailed account of Indian outrages which he witnessed, occurring on the 9th day of August, 1882, upon two trains in motion about forty-five miles from Fort Hall, and fifteen miles from Rat river towards the fort. One of the trains which had come from Iowa city lost its commander, killed, and a gentleman from New York city by the name of C. Bulwinkel. (He had some cards of old date showing a former address to have been 374 Sixth avenue.) The correspondent further wrote, "we helped bury the dead."

Mrs. Gershe Bohlken and her husband, Henry Bohlken, both testified that they had not heard from the said Claus Bulwinkel since he left the city of New York, as stated, and that it was the common report and rumor that he had been killed by the Indians and was dead, as mentioned in the newspaper article. Another sister, Mrs. Dorethea Meislahn, wife of Albert Meislahn, testified that the cards found on the person killed by the Indians and buried by William H. Sargent, containing the words and figures "C. Bulwinkel, 374 Sixth avenue," describes her brother, Claus Bulwinkel, and that it was the general belief and understanding in the family that this was her brother.

His heirs were as follows: The two sisters just named, John Meyer, his nephew; Henrietta Barth, his neice, wife of August Barth; Matilda Van Axte, who married John Fink, and Augusta Van Axte, his neices; these four persons being children of Catherine Van Axte, deceased, formerly Catherine Meyer, a sister of Claus Bulwinkel, and formerly also

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wife of John Meyer, deceased, father of John Meyer, said nephew. They were all of age excepting Augusta Van Axte, who was eighteen years of age.

There was no last will or testament of said Claus Bulwinkel, and no proceedings regarding his estate was ever taken in the surrogate's court, and he had never married.

The first and principal question is as to the death of Claus Bulwinkel. Is the proof sufficient in law to show that he was dead on the 22d day of August, 1862, when the foreclosure suit of Cheesman against him was brought? The presumption of the duration of life, with respect to persons of whom no account can be given, has long been settled, ends at the expiration of seven years from the time they were last known to be living. Therefore, in the absence of all other evidence to show that the party, the period of whose death is under discussion, was living at a later period, there was fair ground to presume that he was dead at the end of seven years from the time of the last account of him (*See Doe d. George agt. Jesson, H. T., 1805, K. B. ; 6 East, 80, cited in Wilkes agt. Lion, 2 Cow. R., 376 ; Same Case, 2 Smith's R., 236 ; S. P. Row agt. Hasland, 1 Bl. R., 405 ; Holman agt. Exon, Carth., 246*).

This limitation of seven years has been the law of the state of New York since February 6, 1788 (*See 1 R. L., 103, sec. 1 ; 3 R. L., 167, sec. 7*). An absence of seven years altogether accounts the absentees naturally dead (*1 R. S., 749, part 2, chap. 1, tit. 5, sec. 6 ; 2 R. S. [Banks' 6th ed.], sec. 61, 1131*).

Section 841 of the Code of Civil Procedure has made provision in the same respect, and reads as follows: "A person upon whose life an estate in real property depends, who remains without the United States, or absents himself in the State or elsewhere for seven years together, is presumed to be dead in an action or special proceeding concerning the property in which his death comes in question, unless it was affirmatively proved that he was alive within that time."

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Thus mere proof of absence for seven years together establishes the presumption of death at the end of that time from the time of the last account of him.

In *Rowe agt. Haslard* (1 *H. Black*, 404) it was decided "in making a title by pedigree, evidence that a man has not been heard of for many years is sufficient evidence *prima facie* to prove him dead without issue." In *Lodyd agt. Hunt* (4 *B. & A.*, 433), where a tenant for life had not been seen or heard of for fourteen years by a person resident near the estate on which he resided, although not a member of his family, it is *prima facie* evidence of the death of such tenant.

In *Doe d. Benning agt. Griffen* (15 East, 293) proof by one of a family, that many years before a younger brother of the person last seized had gone abroad, and that the reports of the family was that he had died there, and that the witness had never heard in the family of his having been married, is *prima facie* evidence that the party was dead, without lawful issue, to entitle the next claimant by descent to recover in ejectment. One of the most interesting cases and full of instruction upon this subject, is *Eagle's case* (reported in 3 *Abb. Pr. R.*, 218, and decided by the learned surrogate BRADFORD in September, 1856) At page 221 he laid down the rule, quoting lord DENMAN: "It is true the law presumes that a person shown to be alive at a given time, remains alive until the contrary be shown, but when the seven years have passed, the presumption of law relates only to the fact of death, and the time of death, whenever it is material, must be the subject of distinct proof. Whoever finds it important to establish death at any particular period, must do so by evidence of some sort." On page 222 he quotes justice GIBSON, in *Burr agt. Lewi* (4 *Whart. R.*, 150), denying the doctrine of lord DENMAN and stating the rule thus: "The presumption of death as a limitation of the presumption of life, must be taken to run exclusively from the termination of the prescribed period, so that the person must be taken to have then

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been dead *and not before*." The evidence shows that the last heard of Claus Bulwinkel, or rather the last account of him, was August 9, 1862, and thus the law would have presumed him dead on the 9th day of August, 1869, seven years thereafter, and the rights and relations of the parties affected by his life or decease would, in the absence of information, have been determined by the statutory presumption.

It is of the highest importance, however, in this case, to determine the death of Claus Bulwinkel at a particular date or time, and for this purpose it is necessary carefully to examine the authorities and evidence applicable to this particular point. The fact of death, especially in the case of absent persons, is not always proved by the most direct testimony, but it is to be inferred from circumstances which either necessarily or usually attend such facts. The force and effect of the evidence is to be determined, and whether the circumstances are sufficiently satisfactory and convincing to warrant the finding of fact. It is well known that hearsay evidence of a fact is not admissible, and the same principle is applicable to statements in writing, but there is an exception to this rule with respect to the death of a person. Proof of a general report and belief of the death of a person is admissible. Thus it was decided in the case of *Doe* agt. *Griffin* (15 *East R.*, 293), that the fact of a soldier, or any other individual, was missing at a particular time, accompanied by a report and belief of his death, must be in many cases not only the best, but the only evidence which can be supposed to exist after his death.

In *Watson* agt. *King* (1 *Stark.*, 121), where a vessel is proved to have sailed and has not been heard of for two or three years, it is to be presumed that she is lost, but at what time an individual on board of such vessel perished, is to be collected by the jury from the particular circumstances of the case. The burden of proof, of course, is upon the party who asserts the death, thus under plea of coverture where it appeared that the defendant's husband went abroad twelve years

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ago, it was held that she was bound to prove that he was alive within seven years (*Hopewell agt. De Penna*, 2 *Camp.*, 113).

The case of *Jackson agt. Boneham* (15 *Johns. R.*, 226), decided in May, 1818, is a case in point as to the sufficiency of the evidence, both as to identity and death. The action was for ejectment. The letters patent were to "*Moses Minner*." Ether *Miner* was called as a witness on the part of the plaintiff, who testified that she was a sister of "*Moses Miner*," who was by trade a gunsmith and lived at Stonington, Conn., and about the year 1774 went to sea. She also proved a letter from Miner to his mother, dated in New York in September, 1775, in which he says "he had got to be a soldier." She heard in 1776 that he was with the New York troops, but never heard from him again until fourteen years after the war, when she was told that he had been killed; that the general opinion in the family was that he was dead, and that he always spelled his name *Minor* and *Miner* and not *Minner*. The testimony as to the death of Moses, and his being with the New York troops was objected to as hearsay but was admitted. There was contention as to the title by defendant upon affirmative proof by deed on his part. The verdict was for plaintiff subject to the opinion of the court which held that the name "*Minner*" was a misspelling, as it was not shown there was any man in the army by that name, and it could not affect the identity of the person; that the hearsay evidence was admissible to show his death and the place where he died.

The case of *Jackson agt. Eta* (5 *Cow. R.*, 314), decided in February, 1826, held that one who was missing at a particular time with a report and general belief of his death, is, it seems, *prima facie* evidence of his death; also proof that a man's intimate acquaintances for several years never heard him speak of his family, father, mother, wife or children, is *prima facie* evidence that he has no heirs, which is in point as to the evidence that the sisters of Claus Bulwinkel never knew him to be married. The decision in the case of *Doe agt. Griffin* (15 *East*, 293) was approvingly quoted by *curia*, *per* SUTHER-

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LAND, J., in this case, and the case of *Jackson agt. Boneham* (15 *Johns. R.*, 228) is cited on page 320.

In the case of *McCartee agt. Camel* (1 *Barb. Ch. R.*, 456, decided in 1846), while following the presumption as to death, made distinction that the person did not die at any particular time within the seven years, or even on the last day of the term, and if he had a fixed place of residence some inquiry should have been made; the mere fact of his absence did not raise the presumption. (The appellant's counsel cites many of the authorities as to the presumption and time of death, on page 458.) The decision was based upon peculiar and particular facts upon which the statute was construed. The evidence showed that the respondent, presumed to be dead, was residing at "Never Die," in the vicinity of Baltimore about twelve years before. Letters written to her had not been answered during that time, and the chancellor facetiously says, at page 464, "it was almost as unsafe to rely upon that circumstance alone as evidence of her death, as it would have been to presume from the name of her last known place of residence, that she would live beyond the usual period of human life." "The more rational presumption was that she had gone to some other place, and the letters written to her had not reached her. For if she had died there, she probably would previous to her death have informed some of her acquaintances that she had a mother and some other relatives living in New York, and that the fact of her death would have been communicated to them by letters. The administrator, therefore, is not entitled to protection on the ground that he was legally authorized to presume the respondent was dead at the time the succession opened in 1832. It will be remarked that the person in this case, presumed to be dead, was in fact alive, and asserted her claim to her share in the estate. In the case already referred to (*Eagle's case*, 3 *Abb. Pr. R.*, 224), the learned surrogate held, "it is within the province of the court or jury to infer from circumstances, if any appear in proof, the probable time of death; but that if no sufficient facts are

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shown from which to draw a reasonable inference that death occurred before the lapse of seven years, the person will be accounted in all legal proceedings as having lived during that period."

The case of *Stonvenal agt. Stephens* (2 *Daly's R.*, 319, decided in June, 1868), sustains the decision in *Eagle's case*, as follows: "Although the law presumes that one who is missing is living until seven years have elapsed, yet circumstances may be shown from which a jury will be warranted in assuming that he was dead at a time within that period." On page 323 the court cites 1 *Greenleaf on Evidence* (sec. 41); *Merritt agt. Thompson* (1 *Hilt.*, 551); *Houston agt. Thornton* (1 *Holt. N. P. C.*, 242); and *Green agt. Brown* (2 *Str.*, 1199) as authorities for the decision (*See, also, Ringhouse agt. Keener*, 49 *Ill.*, 470; *Article on Presumption of Life*, 29 *Alb. Law Jour.*, 347). In the present case Claus Bulwinkel, left New York city in the year 1860. In the year 1861 he was heard of as being in this state at Monticello, and on the 9th day of August, 1862, his death was reported as killed by the Indians, and his dead body was identified by the cards of his former place of business in this city, in his pocket, and he was buried. He was described by a witness as a dressy man, wearing top-boots, talking of Indians and adventures and going out west. He has not been heard from since, a period of nearly twenty-two years, and all his relations believe in his death as reported. The evidence of William H. Sargeant, the newspaper correspondent, would perhaps have been the best evidence of the death of Claus Bulwinkel, but it does not appear that he knew him personally, and therefore he could have testified to no more than he wrote. The date and particulars of his death, identity and burial are given, and so accepted by all of his relations and those who knew him. This newspaper account was a general report of his death, which all of his relatives believed, and they have not heard otherwise for the past twenty-two years. The facts occurred at a remote period, at a great distance, in an unsettled, uncivilized country, and the nature of the case scarcely

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admits of better evidence. There does not appear to be any clue by evidence of a higher or more satisfactory character, if it were necessary. The facts are sufficient to draw the conclusion, which is reasonable under the circumstances, that the real time of the death of Claus Bulwinkel, was on the 9th day of August, 1862, seven years before, and that he did not live during the period of the seven years. The foreclosure action by Cheesman was commenced against him on the 22d day of August, 1862, at a time when he was dead, and had been dead and buried thirteen days, the judgment which was entered in the action November 20, 1862, was therefore void, and no title passed under it. No judgment can be entered either for or against a dead man (3 *R. S.* [5th ed.], 669; 2 *Edmond's Stat.*, 402; *Gerry agt. Post*, 13 *How. Pr. R.*, 118; *Code Civil Pro.*, sec. 765). It is therefore unnecessary to examine whether the executors of Mr. Cheesman had any power under his will to buy in the property forever; if they had, they acquired no title, because the judgment was void. The title to the two lots was therefore in the heirs of Claus Bulwinkel. The foreclosure, by advertisement, did not affect the lots in question because they were not sold, and as the executors acquired sufficient money from the other real property of Claus Bulwinkel included in the \$6,000 mortgage, as matter of law these two lots were released from the mortgage, and the quit-claim deed from the executors to the heirs of Mr. Bulwinkel was a matter of form. It must here be mentioned that the grantees named in this quit-claim deed are not described as the heirs of Claus Bulwinkel, deceased, and we only know that fact by the proof in this action. The action of partition among these heirs was begun September 12, 1871, which was long after the seven years when Claus Bulwinkel would be presumed to be dead by the statute, independent of the evidence of the direct proof of his death. They were sold under the partition judgment to the present plaintiff. The defect of proof of the most material allegations in such a suit, already pointed out, might have been corrected

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in that suit by opening the proceedings as it must have been a careless oversight, and the proofs given and a resale had if necessary; the plaintiff, of course, would have run the risk of again being the purchaser at a less or greater price than he had bought the lots for. It is not, however, necessary for the plaintiff to acquire his title through the partition sale, because the heirs of Claus Bulwinkel had a clear, perfect, unincumbered title, and on the 5th day of January, 1872, conveyed the same to the plaintiff by their deed duly acknowledged and recorded. Therefore, when the plaintiff made the contract of sale of the lots with the defendant, on the 23d day of July, 1883, he had a good, perfect title; the defendant was bound to take it and the plaintiff is entitled to judgment in his favor with the costs of this action.

NOTE.—Although we do not intend as a rule to publish opinions of referees, the above is considered worthy of insertion as citing and commenting on the cases and what facts are sufficient proof of death at a particular time, a question which often affects title to property.—[Ed.]

U. S. CIRCUIT COURT.

ALVAH W. BURLINGAME agt. CENTRAL RAILROAD COMPANY
OF MINNESOTA.

Practice — Jury — Interest — Power of court to cause erroneous verdict to be amended after its entry — Affidavit of jurors competent evidence to prove mistake — When interest should be allowed.

Where the foreman of a jury announces a verdict different from that agreed to by the jury, and the erroneous statement is taken and recorded and the jury allowed to separate, the court, upon application made at the same circuit and upon the following day, has power to call the jury together and interrogate them as to the verdict they agreed upon, and to correct the record so as to make the verdict conform to the actual finding.

Affidavits of the jurors showing the mistake, may be received upon such application.

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Where the services for which the suit was brought were rendered on special request of defendant's, and were to be paid for, the pay is due when such services were performed, and after such time interest should be allowed.

Eastern District of New York, January, 1885.

THIS was an action on contract for services performed as secretary and treasurer by the plaintiff, for defendants, in his official capacity as such secretary and treasurer, and for extra services in superintending work in Minnesota, purchasing materials at points at and between New York and Minnesota, paying laborers at points in Minnesota, making arguments, before local bodies, for town bonds, etc., and obtaining the voting of them and for other services.

It appeared that plaintiff was a director and the regularly elected secretary and treasurer of defendants, and the judge presiding at the United States circuit court at which the cause was tried, charged the jury that they should not allow plaintiff for any services performed by him as director or secretary and treasurer, but that they should allow him for any authorized extra services, if they found any such to have been performed by him, and that if they found for plaintiff any verdict upon such grounds, that he would be entitled to interest on the amount found from the date of the last service so performed. The jury retired late in the afternoon and came in subsequently, the foreman announcing a verdict for plaintiff for \$3,500. The next morning the jury having separated, but the term not having ended, plaintiff's attorney applied to the court to have the statement of the verdict corrected, presenting written memorandum of the jurors afterwards sworn to, in open court, by all the jurors, that the verdict, as intended, was for \$3,500 principal and interest, making in all \$5,538.20. The remaining facts appear sufficiently in the opinion of Hon. HORT H. WHEELER, judge sitting at the United States circuit court, eastern district of New York, before whom and a jury the cause was

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tried, and who, on the application for judgment, rendered the following opinion.

P. W. Ostrander, for plaintiff, cited *Sargeant* agt. ——— (5 Cow., 106); *Ex parte Cuykendall* (6 Cow., 53); *Jackson* agt. *Dickenson* (15 J. R., 309); *Roberts* agt. *Hughes* (7 M. & W., 399); *Prussel* agt. *Knowles* (4 How. [Miss.], 90); *Hurnford* agt. *East* (27 T. R., 281); *Smith* agt. *Cheatham* (3 Caines' Cases, 57); *Dalrymple* agt. *Williams* (63 N. Y., 361); *Cogan* agt. *Elden* (1 Burr, 383).

R. W. De Forest, for defendant.

WHEELER, J. — This is an action to recover for personal services rendered while the plaintiff was a director and treasurer of the defendant. The jury were directed to return a verdict for the plaintiff for such services as he rendered, if any, outside the scope of his duties as director and treasurer at the special request of the president and the rest of the board of directors, and that if they found for the plaintiff they might allow interest from the time when the services were completed. Late in the day they returned a verdict for the plaintiff for \$3,500, and the court was immediately adjourned to the next day. During the next day a statement was made to the court that the jury intended to give a verdict for \$3,500 with interest. On the morning of the next day after that, and on notice to defendant's counsel to be present, and while the counsel for both parties were present, the court directed the jury to be recalled to their places, and that the verdict as recorded be read to them, and that they be asked if that was their verdict. This was done and the foreman answered that it was not, that their verdict was for \$3,500 with interest. They were directed to compute the interest and agree upon the amount, which they did, and answered that it was \$2,038.20, making \$5,538.20, and that their verdict was for the plaintiff for that amount, which was ordered to be recorded, and the jury being interrogated separately all said that that was their

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verdict. At the same time an affidavit of all the jurors was presented and filed stating that the verdict agreed upon was for the plaintiff for \$3,500 with interest. The plaintiff now moves for judgment on the verdict for the full amount. The defendant objects to judgment on the verdict for any more than \$3,500, on the ground that interest was not recoverable, and because it was not within the power of the court to allow the verdict to be varied after it had been received and recorded. As the services were rendered on special request and to be paid for, the pay was due when they were performed and after that time was detained by the defendant against the right of the plaintiff to have it. Under these circumstances it ought to bear interest (*People agt. Gasherie*, 9 *Jolns.*, 71; *Wood agt. Robbins*, 11 *Mass.*, 504; *Burdett agt. Estey*, 19 *Blatch.*, 1). The power of the court to cause the verdict to be corrected would seem to be ample according to the law of the state of New York and the practice of its courts as settled by its highest court. In *Dalrymple agt. Williams* (63 *N. Y.*, 361) the jury returned a verdict against two, when the verdict agreed upon was against one and in favor of the other, and the verdict was recorded and the jury separated. Afterwards on the same day, on the affidavit of all the jurors, the verdict was corrected and the judgment entered upon it. This course was approved. In *Cogan agt. Elden* (1 *Burr.*, 383), where the issue was as to two rights of way under which the defendant justified, the jury found for the defendant as to one, and for the plaintiff as to the other, but returned a verdict for the defendant as to both and separated. This verdict was corrected on the affidavit of the jurors. In this case there is no suspicion of any unfair conduct on the part of the jurors or any one. It was an honest mistake which, if not corrected, would prevent the finding of the jury as it actually was from being carried out. The correction is not an impeachment of the verdict by the jurors in any sense. It upholds the real verdict and prevents miscarriage in its delivery into court. The verdict as first recorded was not the real verdict of the

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jury. If it could not be corrected it should be set aside. Neither party has moved for that.

Judgment on verdict for full amount.

N. Y. SUPERIOR COURT.

THE PEOPLE *ex rel.* THEODORE ROOSEVELT and others,
respondents, agt. FRANKLIN B. EDSON, appellant.

Injunction — Contempt — Code of Civil Procedure, sections 277, 606, 772 — The provisions of section 772 as to what judges may make orders out of court do not apply to injunction orders — A judge of New York common pleas has no power to grant an injunction order in an action in New York superior court — Person violating such order not guilty of contempt.

Section 772 of the Code of Civil Procedure, prescribing what judges may make orders out of court without notice, with indifference as to the particular court in which the action may be, does not apply to injunction orders, in respect to which the special provision contained in section 606 controls.

A judge of the court of common pleas is not a county judge, and has not the power of one, within the meaning of section 606, providing that an injunction order can only be granted by a judge of the court where the action is, or by that court, or by a county judge.

A judge of the common pleas has not power, therefore, to grant an injunction order in an action in the superior court, and a person violating such an order is not guilty of contempt (*Reversing S. C., ante, 281*).

General Term, April, 1885.

Before SEDGWICK, C. J., O'GORMAN and INGRAHAM, JJ.

APPEAL by respondent from an order convicting defendant of contempt in disobeying an injunction order.

The injunction order was made to accompany a summons in an action brought, or about to be brought, in this court. The order was signed by a judge of the common pleas for the city and county of New York. The defendant disregarded the order by doing what the terms of the order enjoined him

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from doing, and, in certain proceedings to punish him for contempt, was held to be in contempt.

David Dudley Field and Robert Sewell, for appellant.

Charles P. Miller, for respondent.

PER CURIAM (SEDGWICK, C. J.).— The judge of the common pleas who made the injunction order in this case had not a legal power to make it. The validity of the exercise of such a power, if it exist, must be found in some section of the Code of Civil Procedure. It will be necessary to examine only sections 277, 606 and 772. It will be expedient to examine section 772 in the first place. It occurs in title 5 with the heading "motions and orders generally." Section 772 is headed "what judges may make orders out of court without notice." It proceeds to declare that where an order in an action may be made by a judge of the court out of court, and without notice, and the particular judge is not specially designated by law, it (except it be to stay proceedings after verdict, report or decision) may be made by a justice of the supreme court or by a judge of a superior city court within the city where his court is located or by the county judge of the county where the action is triable, or in which the attorney for the applicant resides. If an injunction order is within the meaning of the clause that has been cited, then the order in this case had validity, not because the judge signing the order was a county judge, but because he was a judge of a superior city court. The clause was not meant to embrace an injunction order. It was a provision that respected orders in general, without a specific reference to any class of orders with peculiar characteristics. The general class of orders was those that might be made by a judge out of court without notice.

It is a familiar rule of statutory construction that a statute that provides, in respect of a particular case, is not repealed by a statute that describes a general class, although the par-

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ticular case would be verbally within the general terms, unless an intention to repeal is otherwise manifested (50 *N. Y.*, 493; 66 *N. Y.*, 1; 69 *N. Y.*, 605). The principle is applicable *a fortiori* to different sections of one act, the whole of which becomes a law at one time. And, therefore, if there be elsewhere in the Code a special provision as to injunction orders that special provision controls.

As to orders granting provisional remedies and that may be made by a judge out of court without notice, the Code has made special or particular provisions, which it was unnecessary to make if section 772 was meant to be the enactment as to them. By section 556 an order of arrest, except, &c., must be obtained from a judge of the court in which the action is pending, or from any county judge. By section 633 a warrant of attachment may be made by a judge of the court or by any county judge. By section 606 an injunction order may be granted by the court in which the action is brought, or by a judge thereof, or by any county judge. No one can fail to observe that in these several cases the limitation of the powers to grant the orders have been made with some purpose that relates to the character of the remedy. If these special provisions had been placed in section 772, at the end of the general words that have been given, it would at once be seen that there was no inconsistency, and that the special provisions were to be followed according to their own terms. The separation of them by intervening sections does not make them not to be the law, or prevent the application of the rule of construction that has been adverted to. It is argued that a part of section 772, and not yet noticed, shows that the intention was that the general language should refer to injunction orders. Such an order grants a provisional remedy. That part immediately follows what has been quoted and is, "where such an order grants a provisional remedy it can be vacated only in the manner specially prescribed by law," &c.

The argument is that the words "such an order" recognize

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that the general words as to orders before used embrace orders granting provisional remedies. It is certainly true that orders for provisional remedies may be made by a judge out of court, and it must be supposed that the law makers did not lose sight of this when the general words were used. This is not all that needs consideration here. The law makers also knew that the general words did not exclude the operation of special provisions as to the granting of particular kinds of orders. These special provisions were to be combined with the general provision, and it was in reference to all of them together, as being the law, that the part now under consideration proceeds. Therefore the words "such an order" must not be held to repeal any provision that had been specially made as to certain classes of orders, or in other words to affect any provision as to the court or judge authorized to make orders. It was an independent provision, as if made in another section, and meant that where an order that may be made by a judge out of court, which is the meaning of "such an order," grants a provisional remedy, it can be vacated only, &c.

The construction now given to section 606 gains strength from these words in it: "Except where it is otherwise specially prescribed." There is a special prescription in section 505. There is no special prescription in section 772, which is in general terms. Therefore there is almost an explicit declaration that section 606 furnishes the only rule as to the power to make injunction orders. What is the difference between the respective applications of sections 772 and 606? By section 772 other orders than injunction orders may be made by the judge of the supreme court or of the common pleas or of a superior court or by a county judge, with indifference as to the particular court in which the action may be. By section 606 such an order can only be granted by a judge of the court where the action is, or by that court or by a county judge. It is not necessary to state the reasons for these varying limitations. It is enough to perceive that

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the limitations are so marked that they cannot be supposed to be absent from the intention of the legislature.

The inquiry remains whether, within the meaning of section 606, a judge of the common pleas is a county judge. A county judge is a specific title used in the constitution and statutes to identify a certain judicial officer, with peculiar powers and the head of the county court. Section 14, article 6, constitution of 1846, says there shall be elected in each of the counties, except the city and county of New York, one county judge. He shall hold the county court, &c. Section 15 of the same article, as amended December 9, 1869, continued county courts and county judges by these titles. The Code of Civil Procedure so classifies these courts and officers as courts of common pleas, superior courts, county judges and county courts in such an exact way that they cannot be confused, and it must be said that the one is not the other. It may be argued that a judge of the common pleas has the power of a county judge. No statute to such an effect has been cited. If there were one it would not avail against a statute which, in respect of a particular class of orders, in effect names a judge of the court of common pleas and a county judge, allowing the former to grant the order if the action be in his court, or if it be not, then by a county judge or a judge of the court in which the action is.

This, however, by no means exhausts the discriminations of the statute. The following is significant: There are three classes of authorized makers of injunction orders. The system of classification had some ground which calls for respect as much as does the meaning of words. The first class is of courts in which the action may be. The second is of the judges of such courts. The third is of county judges. There is no other class of judges other than those of the court where the action is. If a judge who is not a county judge, but is assumed to have the power of a county judge, is for that reason, by construction, authorized to make the order, not being a judge of the court where the action is, the second

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class and its reason are obliterated. The subject-matter of such an inquiry as the present is, in every case, what do the words mean in the particular act or section where they occur? It is a rule of general application that legal terms have their legal meaning, unless there be some indication to the contrary. Under these propositions the cases that have been cited to show that a judge of the common pleas has the power of a county judge, or is a county judge, should be examined.

Morgan's case (56 N. Y., 629) is not reported in full. The digests give no reference to the decision below. A memorandum only of the case in the court of appeals is made, and the head note alone gives information as to the decision. It is, the term county judge, as employed in the act of 1860 to secure to creditors a just division of the estate of debtors who convey to assignees, &c. (*Chap. 348 of Laws of 1860 and the various acts amendatory; chap. 860, Laws of 1867; chap. 92 of Laws of 1870; chap. 838, Laws of 1872, and chap. 363, Laws of 1873*), includes the judges of the court of common pleas for the city and county of New York and the jurisdiction conferred by said acts upon the county judge is rightfully exercised by the judges of the said court of common pleas when the debtor resides in the city of New York.

The acts, outside of the words to be construed in them, namely, county court and county judge, provided beyond controversy for the regulation of assignments for benefit of creditors in every county of the state. It would be inconceivable that it was not intended to apply to the county of New York. The judicial agents for the enforcement of the acts were described as county court and county judge. The particular question was where the acts applied to all the counties of the state, what did they mean by county judge as applied to the county of New York where there was no county judge proper? The conclusion was, that from the history of the common pleas and its former jurisdiction and nomenclature, the act meant that court for the purposes of the enforcement of the act in the county of New York. This

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did not involve that in the county of New York, the common pleas or its judges acted because they had the powers of a county court in a proper sense, or were county judges proper, but they acted as a court of common pleas or a judge of it *proprio vigore*. Such a result was inevitable after it had been held that the face of the acts showed that the words county judge were used not in a restricted legal and technical way, but in a general sense.

When the acts referred to were repealed by section 23, chap. 466, Laws of 1877, it was deemed prudent to enact by section 24 that a judge of the common pleas of the city of New York "may exercise all the powers of a county judge for said county for the purposes of this act."

In *Wood v. Kelly* (2 *Hill*, 337) the only remark that could apply to the subject was made by a single judge as an additional reason to those given by another judge for affirming an order allowing an amendment. There is no doubt that the remark was correct. It, however, only applied to the court possessing the power of a county court, and not to any judge of either court. It was based upon section 6 of the Laws of 1854, chapter 198, entitled an act in relation to the court of common pleas for the city and county of New York. Section 6 was repealed by chapter 417 of the Laws of 1877.

Lang v. Brown (6 *Hun*, 256) is cited. It states that judges of the common pleas are county judges on the authority of *Matter of Morgan* (56 *N. Y.*, 269). We have seen that that case only declares that within the meaning of the acts there involved, county judges indicated judges of the common pleas. To maintain the proposition under the Code of Civil Procedure would be to disregard fundamental distinctions very carefully made in it. The statute before the court was a section of the Revised Statutes. The opinion then says that by section 27, Laws of 1847, the judiciary act, county judges are clothed with the powers that a judge of the court of common pleas being, &c., could exercise. This does not show that a judge of the common pleas is clothed with the powers of a county

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judge. The section could not be read by substituting for county judge, a judge of common pleas without considering it the equivalent of an enactment that a judge of the common pleas is clothed with the powers of a judge of the common pleas. In fact the section has been repealed by chapter 417 of the Laws of 1877.

In *People ex rel. Ireland v. Donohue* (15 Hun, 446), it was held that under section 556, Code of Civil Procedure, which provides that an order of arrest may be granted by a judge of the court where the action is brought, or by the county judge, a judge of the common pleas is a county judge. The making of the order was not said to be valid under section 772, and no particular examination of the question was made, but the decision was placed upon *Matter of Morgan* (56 N. Y., 629). It is, therefore, to be deemed but a reiteration of the ruling in that case, the effect of which has been examined.

Nor does section 277 support the order. That provides that in an action or special proceeding brought in a superior city court an order may be made without notice by the county judge of the county where the court is situated, or of the county where the attorney for the applicant resides, in a case where a judge of the superior city court might make the same out of court. It seems to be clear that the judge who made the order is not the county judge of this county, nor did he make it as such. It would seem only necessary to say that the section refers to the power of the county judge, and not to the power of a superior city court judge. As the making of the order was not authorized by law, the appellant was not bound to obey it, and was not in contempt for disregarding it.

The order appealed from should be reversed, and an order entered dismissing all proceedings, with costs.

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CITY COURT OF NEW YORK.

CHARLES FRAZIER *et al.* agt. JOHN B. DAVIDS *et al.*

*Code of Civil Procedure, section 873 — Examination of parties before trial —
When application for order will be denied*

An examination of a plaintiff, will not be allowed, for the purpose of discovering what consideration the plaintiff paid for the note sued on, and which was misappropriated by the party to whom it had been intrusted to procure its discount and return the proceeds to the makers.

An examination will not be allowed in a case where a bill of discovery could not be maintained.

Where the object for which the examination is sought by the petitioner, is for the purpose of discovering whether the plaintiffs can maintain their cause of action, the nature and number of their witnesses, or of determining whether the plaintiffs have title to the note, or else to anticipate perjury, the application will be denied.

Special Term, April, 1885.

MOTION to vacate an order for the examination of the plaintiff before trial.

P. & D. Mitchell, for motion.

I. A. Englehart, opposed.

BROWNE, J. — The general term of this court decided in a case similar in its facts to this, that an examination of the plaintiff would not be allowed for the purpose of discovering what consideration the plaintiff paid for the note sued on, and which was misappropriated by the party to whom it had been intrusted to procure its discount and return the proceeds to makers.

The case referred to is *Smith agt. Irvine*, and will be found in volume 2, cases May general term, 1884, clerk's office. The defendants in that case answered, and in their answer recited the facts under which they parted with the note, and

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alleged that the plaintiff received it without consideration. This placed the defendants in the position of being possessed of the facts they swore to, to support their defense, and under the authority of *Chapman agt. Thompson* (16 *Hun*, 53), the order of examination was reversed.

In *Glenney agt. Stedwell* (64 *N. Y. R.*; also reported in 1 *Abb. N. C.*, 327, where many decisions are collated in a note to the case) the rule was laid down that the power given by the Code to examine an adverse party before trial is a substitute for the bill of discovery in chancery, and this rule prevails in this court.

In the case of *Kanter agt. Brophy* (General Term, Nov. 15, 1880, 1 *Civ. Pro. Rep.*, 83, note), McADAM, J., writing the opinion, says: "We must follow the unbroken chain of authorities laid down by the other courts, that the examination can only be had in the cases in which, under the former practice, a discovery might have been had in equity." Citing cases in which the rule was adopted in other courts.

In a recent case in this court (*Goldberg agt. Roberts*) an order was made for the examination of the defendants to discover if a copartnership existed among them, a motion to vacate was denied, and an appeal was taken to the general term, which sustained the order. Mr. justice McADAM dissented and filed an opinion on the 17th day of November, 1883. He adhered to the rule above laid down, "that the plaintiff under the facts shown would not be entitled to a bill of discovery." An appeal was taken to the court of common pleas, which affirmed the order of the general term of this court, but BEACH, J., writing the opinion of affirmance, says: "In this court the order has been held proper in any case when a bill of discovery would have been upheld in equity" (Citing 52 *How.*, 401; 7 *Daly*, 238; 2 *Abb. N. C.*, 146). While adopting the rule he questions its propriety under the existing statutes (Cites *Brisbane agt. Brisbane*, 27 *Sup. Ct. R.*, 48). The order was upheld, however, upon the ground that a bill of discovery would have been maintained upon the

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facts set forth in the case presented for review (*MSS. opinion filed in court of common pleas, March 14, 1834*).

It thus appears that the line of decisions in this court and its reviewing tribunal remains unbroken in maintaining the principle that an examination will not be allowed in a case where a bill of discovery could not be maintained. A bill was never allowed to a party for the purpose of getting information as to whether he had a case, nor merely to explore his adversary's case, or where the defendant in the bill would be compelled to disclose his own title. Nor was a bill of discovery permitted to be used for mere inquisitorial purposes, such as to ascertain the names of defendants' witnesses, or the evidence or means by which he intended to establish his case (*See, also, collated case on p. 75, 1 Civ. Pro. Rep.*). I find among the collated cases in the note to *Glenny agt. Stedwell* (1 *Abb. N. C.*, 327, *supra*), two illustrations of the rule applicable to the case at bar.

"The first is where an executrix, sued for a debt claimed to be due from her testator, applied for a bill of discovery on the ground that she knew nothing of the demand of her own knowledge, and believed it to be unjust because the creditor had taken no measures to liquidate the debt during the lifetime of her testator, &c.

"*Held*, that the bill did not contain sufficient equity to entitle the applicant to a discovery (*Citing court of errors* [1800], *opinion by KENT, J., Newkirk agt. Willett, 2 Johns. Cases*, 413; *S. C., 2 Cai. Cases*, 296). The other is where one was sued at law as indorser of a note and who pleaded the statute of limitations, whereupon the plaintiff applied for a discovery of the origin and ground of the consideration of the note, in order to enable him to meet the plea at law by showing a part payment within the six years.

"*Held*, that the defendant was not bound to make a discovery (*Lansing agt. Starr, 2 Johns. Ch.*, 150), and that a bill will not be allowed merely to guard against anticipated perjury (*Leggett agt. Postley, 2 Paige*, 602; *Mora agt.*

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McCready, 2 *Bosw.*, 669), and neither will it be allowed to discover usury (11 *Wend.*, 329; 3 *Paige*, 539; 7 *id.*, 598; 9 *id.*, 197; 11 *id.*, 618; 2 *Jones Eq.*, 62)."

Applying the rules evolved from these decisions to this case, it establishes the conclusion that the examination applied for cannot be allowed. The facts shown by the affidavit are that the defendants Seabury and Davids, upon the representations of one Austin, that he could obtain the money on the note in suit among others, and would pay it to them when obtained, and if he did not he would return the notes within fifteen days, they delivered the note to Austin; that Austin neither paid over the money nor delivered back the note; that he cannot now be found; he is charged with converting the proceeds of the note to his own use; that he passed the note out of his possession wrongfully to defendant Law and to the plaintiffs, as the defendant Davids is informed and believes to be true; that plaintiffs could have obtained this information upon inquiry of the defendants Seabury and Davis; that no value ever passed between Austin on the one hand and Seabury and Davids on the other, and that the former never had any right to pass said note out of his possession without obtaining its proceeds and paying the same over to the latter. Upon these facts the applicant concludes by a desire to examine the plaintiffs and the defendant Law as to all the material allegations of the complaint respecting the manner in which said note was obtained by plaintiffs and the consideration paid for it.

If any conclusion can be arrived at as to the object for which the plaintiffs' examination is sought by the petitioner, beyond the mere desire to have such examination (that being the only express object stated), we must assume that it is for the purpose of discovering whether the plaintiffs can maintain their cause of action, the nature and number of their witnesses, or of determining whether the plaintiffs have title to the note, or else to anticipate perjury. In no aspect of the case does the affiant bring himself within the rule entitling a party to a

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bill of discovery. I can discover nothing beyond a mere inquisitorial investigation for the purpose of ascertaining what the adverse party will swear to, in order that the applicant may be enabled to meet or overcome it. This is not permissible (*Schepmoes agt. Bousson*, 1 *Abb. N. C.*, 481; *Chapin agt. Thompson*, *supra*). The moving papers do not state or show that the testimony of the persons desired to be examined is material to the party making such application for the defense of the action (*Code*, sec. 873; *cases cited in note on page 90 of 1 Civil Pro. R.*).

Upon the argument of the motion it was urged that the examination was desired in order to enable the applicant to frame his answer. Not only does it not appear that he is unable to do so, but it affirmatively appears that he is in possession of all the information necessary to controvert every fact alleged by plaintiffs and to put in issue the *bona fides* of the plaintiffs' title. As before stated, he avers that Austin passed the notes to Law and the plaintiffs wrongfully, as he is informed, and such information he believes to be true, and that they (the parties whom applicant desires to examine) could have been informed of these facts by the affiant, if they had intended to become *bona fide* holders. In different language he says: "You got the notes wrongfully, therefore have no title, and I could have given you the facts if you called upon me." It seems to me he is possessed of all the knowledge necessary to frame his answer. If Austin passed the note wrongfully to Law, and the plaintiffs received it wrongfully, the wrongful act would vitiate the plaintiffs' title to it, and the applicant has the knowledge of it, and as a logical sequence of such knowledge he can set up the wrong in his answer, and *prima facie* proof of it given by him will compel the plaintiffs to defend their title. It is shown that Austin was authorized to negotiate the note wherever he could, and the presumption of honest dealing attaches to his acts in passing the note unless the contrary is shown, and as the applicant says he can show it, I cannot

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conceive the necessity of calling upon the plaintiffs to aid him, and as necessity for the examination is a cardinal factor in determining the right to it, its absence alone would warrant a refusal to allow it.

I cannot discover a legal basis upon which to maintain the order.

Order will be vacated, with ten dollars costs to plaintiffs.

SUPREME COURT.

MILLVILLE MANUFACTURING COMPANY, appellant, agt. JOHN T. SALTER, respondent, impleaded, &c.

Pleading — Complaint — Answer — Denials in, when bad — When allegations of complaint to be deemed admitted.

The complaint contained the usual allegations to charge the drawer and acceptor of a draft. The only denial in the answer of the defendant sued as the acceptor was, "denies each and every allegation therein contained not hereinafter specifically admitted, controverted or denied.

Held, that such a denial was neither a general nor specific denial, and, therefore, no denial; and that consequently all the allegations of the complaint were admitted, and that the referee erred in dismissing the complaint for want of proof that the defendant who was sued as acceptor had accepted the draft.

Held, also, that a statement in the answer admitting the acceptance "of a draft similar to the one set forth in the complaint" was an admission of the acceptance of the draft sued on.

First Department, General Term, April, 1885.

Before DAVIS, P. J., BRADY and DANIELS, JJ.

Charles M. Hall, for appellant.

J. Homer Hildreth, for respondent.

PER CURIAM. — The action, so far as it was against the defendant Salter, was brought to enforce his liability as the

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acceptor of a draft or bill of exchange drawn upon him. Its presentation to and acceptance by him was alleged in the complaint, and by his answer. Without either generally or specifically denying either of the allegations in the complaint, he admitted "the acceptance of a draft similar to the one set forth in the complaint herein, but alleges that the same was for the accommodation of the drawer and co-defendant Canfield, and that there was never any value or consideration for the acceptance or payment of said draft by this defendant." The plaintiff did not prove the acceptance of the draft by Salter, and because of that omission the referee determined the action in his favor. But in that he was clearly in error, for his answer contained no general denial and no specific denial of the acceptance of the draft by Salter, but admitted the acceptance of a similar draft without any allegation that it was different from the one set forth in the complaint. It was admitted in effect that the allegation contained in the complaint on this subject was true. That resulted from the omission to deny, either generally or specifically, what was alleged in the complaint. And the failure to deny the acceptance of the draft, together with the statement admitting the acceptance of a similar draft, was all that could be required to establish the fact that the defendant Salter did accept the draft in suit, as it was alleged he did in the complaint. The construction placed upon the pleadings by the referee was unsupported, by which he concluded that the acceptance of the draft was not established. He should, on the contrary, have held the pleadings to have admitted the fact of the acceptance, and determined the action upon the basis of the existence of that fact.

The judgment should be reversed and a new trial granted, with costs to abide the event.

NOTE.—See to same effect *Porter* agt. *Frall* (87 *How.*, 445); *Callanan* agt. *Gilman* (87 *How.*, 464) and *Spiegel* agt. *Thompson* (*ante*, 129).—[Ed.]

The Continental Store Service Company agt. Clark and others.

SUPREME COURT.

THE CONTINENTAL STORE SERVICE COMPANY, respondent, agt.
CURTIS CLARK and others, appellants.

Injunction — May be issued on affidavit — Reference — United States courts exclusive jurisdiction over infringements of patents — Code of Civil Procedure, sections 604-628-1015.

An injunction may be issued upon affidavit without a complaint. The state courts have no authority to issue an injunction to prevent an infringement of a patented invention. The courts of the United States are invested with exclusive jurisdiction over that subject, and it cannot be exercised by the courts of the states.

Where an injunction has been issued upon affidavits, which show the controverted fact upon which the disposition of the litigation will probably be required to depend to be the title of certain patents, and it is deemed to be too uncertainly presented to be disposed of on affidavits, a reference is authorized by section 1015 of the Code of Civil Procedure, upon which the evidence may be orally produced before the referee affecting the rights of the parties.

First Department, General Term, April, 1885.

Before DAVIS, P. J., and DANIELS, J.

APPEAL from an order continuing an injunction and directing a reference to take proof of the facts mentioned in the affidavits, and report to the court the evidence taken by the referee, together with his opinion thereon.

Samuel W. Weiss and Gibson Putzel, for appellant.

John Murray Mitchell, for respondent.

DANIELS, J. — The injunction was issued upon an affidavit setting forth the facts upon which the plaintiff relies to support its right of action. They were reasonably well authenticated, and upon the affidavit the court was authorized to issue the injunction by subdivision 1 of section 604 of the Code of Civil Procedure. That the injunction may be issued upon affidavit without complaint, is not only provided for by this subdivision, but that intent has been made still more clear by

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section 628 of the Code, providing that an application to discharge it may be made, after the service of the complaint itself, when it may fail to set forth a cause of action appearing to entitle the plaintiff to the order.

The subject of the controversy in the action was seven patents issued for improvements relating to the cash car system, in use in stores, issued to Milton Clark. The plaintiff claimed to have acquired the title to these patents, and a like claim was made to them under the same invention on behalf of the defendants, the New York Store Service Company having claimed finally to have acquired the superior title to these patents. As the affidavits were presented the title to the patents is the controverted fact upon which the disposition of the litigation will probably be required to depend, and as it was deemed to be too uncertainly presented to be disposed of on the affidavits, the court considered it to be its duty to order a reference upon which the evidence could be orally produced before the referee affecting the rights of the parties. This reference was authorized by section 1015 of the Code of Civil Procedure. It was such a question of fact, and so important in its character, as could satisfactorily be determined in no other way.

The injunction itself, so far as it restrained the defendants "from putting up or in use, implements, machines, contrivances, inventions, appliances, or any of them, pertaining to said patents and systems in any way whatsoever," was made without authority. Its object was to prevent an infringement of the patented invention by the defendants, and that the state courts have no authority to do (*De Witt agt. Elmira, &c., Co.*, 66 N. Y., 459). The courts of the United States have been invested with exclusive jurisdiction over that subject, and it cannot be exercised by the courts of the states.

So much of the injunction order as provides for this restraint should be vacated, and, as so modified, the orders should be affirmed, with costs to abide the event of the motion.

DAVIS, P. J., concurred.

Ansonia Brass and Copper Company agt. Connor *et al.*

COURT OF APPEALS.

ANSONIA BRASS AND COPPER COMPANY, appellants, agt.
WILLIAM C. CONNOR *et al.*, executors, &c., respondents.

Appeal — Practice as to appeals allowed by the common pleas from a judgment of the city court — Code of Civil Procedure, sections 190, 191, 3194, 3193, 1900.

Where an appeal is allowed by the common pleas from a judgment of the city court, the notice of appeal should specify that the appeal is from the order or judgment of the common pleas, as there can be no appeal to the court of appeals from the city court.

Decided April, 1885.

M. P. Stafford, for appellant.

Vanderpoel, Green & Cumming, for respondents.

RAPALLO, J. — Judgment was rendered in favor of the defendant by the city court (late the marine court) of the city of New York, and affirmed by the general term of the city court. On appeal to the court of common pleas, that court affirmed the judgment and granted leave to the plaintiff to appeal to this court from the judgment, to be entered on the decision of the court of common pleas. An order of affirmance was entered in the court of common pleas, and afterward, on the 3d of June, 1884, a judgment was entered in the city court reciting that a *remittitur* had been sent down from the court of common pleas and making the judgment of the court of common pleas the judgment of the city court. Thereupon the plaintiff served notice of appeal to this court from the judgment entered in the office of the clerk of the city court in this action on the 3d of June, 1884, no reference being made in the notice of appeal to the judgment or order of the court of common pleas.

The respondent now takes the point that no appeal lies to this court from a judgment of the city court, and that the appeal should have been from the determination of the court of common pleas at general term. Section 190 of the Code

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of Civil Procedure gives jurisdiction to this court to review upon appeal actual determinations, made at general term by the supreme court or either of the superior courts, and no others. To this right of appeal there are several exceptions which are enumerated in section 191, one of which is, that an appeal cannot be taken in an action commenced in the marine court unless the court below allows the appeal. The court below in the present case (*viz.*, the court of common pleas) did allow the appeal, but we think that the appeal should have been in form from the judgment rendered by the court of common pleas, there being no authority in the Code to appeal to this court from a judgment of the marine or city court. The judgment reviewable in this case is that set forth in the *remittitur* sent down to the city court.

The appeal in the form in which it has been taken is sought to be justified by the provisions of section 3194, which requires that the judgment or order of the appellate court be remitted to the court below to be enforced, and section 3195, which directs that upon an appeal to the court of appeals, the notice of appeal and undertaking must be filed with the clerk of the marine court, who must transmit the necessary papers to the court of appeals. This direction, however, is not sufficient to establish that the appeal should be taken from the judgment of the marine court entered upon the *remittitur*. If the appeal could properly be taken from that judgment, the direction to file the notice, &c., in the office of the clerk of the marine court would not be necessary, for the general provision would apply that notice of appeal must be served upon the clerk with whom the judgment appealed from is entered by filing it in his office (*Sec.* 1300). The special direction to file the notice in the office of the clerk of the marine court is given for the very reason that the appeal is not to be taken from the judgment entered in his office, though he has the custody of the record.

The appeal should be dismissed.

All concur, except ANDREWS and EARL, JJ., dissenting.

De Bost agt. Albert Palmer Company.

SUPREME COURT.

AUGUSTUS B. DE BOST agt. ALBERT PALMER COMPANY.

Corporations — By-laws — To what extent by-laws of corporations evidence as to authority of officers — Practice — Requests of counsel to charge — When refusal by court error.

The by-laws of a corporation containing restrictions and limitations upon powers of the officers are competent evidence as to the authority of the officers.

Persons dealing with a corporation are required to take notice of the limitations imposed in the by-laws upon the authority of an officer or agent (*Citing Adriance agt. Rome*, 52 Barb., 399; *Dabney agt. Stephen*, 10 Abb., 39; *Alexander agt. Coudwell*, 83 N. Y., 480; *disapproving Marowitz on Corporations*, sec. 64).

A refusal of the court to pass upon a question of law requested by a counsel to be charged is an error for which the judgment should be reversed.

This is so even though the requests be unreasonable in number.

First Department, General Term, March, 1885.

Before DAVIS, P. J., BRADY and DANIELS, JJ.

THE action was brought against the corporation to recover upon a written contract signed by the president, and upon the trial the defendant's counsel offered in evidence the by-laws of the corporation, duly authenticated to prove certain restrictions and limitations on the authority of the officer signing the contract. The counsel for the plaintiff objected on the ground that no notice of the existence of the provisions of the by-laws was shown to be given by the corporation to the plaintiff. The court sustained the objection and exception was taken.

At the close of the testimony the defendant's counsel submitted certain requests to charge; and the court at the close of the charge said as follows:

COUNSEL — "I desire to call your honor's attention to certain propositions embodied in the written request to charge which I have submitted to —

THE COURT — "I decline to charge further than I have already." The defendant excepts.

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A motion for a new trial was made on these grounds and denied, Mr. justice POTTER writing an opinion.

James B. Dill (Dill & Chandler, attorneys), for the appellant, argued: I. That the refusal of the court to admit the by-laws of the corporation after proper authentication was error. Persons dealing with the corporation are chargeable with notice of the restrictions upon the authorities of officers and agents contained in the charter or by-laws (*Adrianco agt. Rome*, 52 Barb., 399; *Debaney agt. Stephens*, 10 Abb. [N. S.], 39; *Macculough agt. Morse*, 5 Denio, 575; *Alexander agt. Cauldwell*, 83 N. Y., 480.)

II. The court erred in refusing to entertain defendant's request to charge. It is a legal right of counsel to submit propositions in due form and at the proper time, with a request to the court to charge the same; and the court must charge particular requests, as requested, or give the counsel the benefit of an exception (*Citing Betts agt. Connor*, 7 Daly, 550; *Chapman agt. McCormack*, 86 N. Y., 479).

Alexander & Green, opposed: A person dealing with a corporation is not required to take notice of its by-laws (*Marowitz on Corporations*, sec. 64, and cases cited; *Miner agt. Mechanics' Bank*, 1 Peters, 46). A request to charge numerous propositions of law, presented in bulk, presents no exception (*Citing Hoyt agt. L. I. R. R. Co.*, 57 N. Y., 679; *Wyuli agt. Pacific Bank*, 47 N. Y., 576).

DAVIS, P. J. — This action is brought upon two alleged causes of action: First. To recover commissions upon sale of certain real property belonging to the defendant under an oral agreement alleged to have been made between the plaintiff and the defendant. Second. To recover commissions upon an agreement in writing, alleged to have been made by the defendant with the plaintiff for the payment to the latter of commissions upon the sale of the same lands.

The answer put in issue the making of the alleged agree-

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ment and especially denied that the written instrument, the copy of which was annexed to the complaint, was executed by the defendant or ever ratified by it. The defendant is a corporation created under the laws of this state. The instrument (*exhibit A*), annexed to the complaint appears to be an agreement of the defendant corporation and four individuals, as owners of certain real property therein described, and recites that they had entered into a written agreement with one Leon DeBost for the sale of the lands to him for \$45,000; the sale was made by Augustus B. DeBost, the plaintiff, as their agent, with the understanding that upon payment of the sum of \$45,000 they would allow and pay him \$500 for making the sale. It then in substance provides for the payment of that commission to the plaintiff by the several parties in proportion to their respective interests; the interest of the defendant corporation being stated at one-tenth, and the amount to be paid at one-tenth of \$5,000.

This instrument was signed and sealed by the several individual parties to it, and so far as the corporation is concerned, as follows:

A. W. PALMER, *President*. [L. s.]

It was acknowledged before a notary public by the individuals and by A. W. Palmer, individually, and not as president in the usual form of acknowledgments. On the trial it became an important question whether or not this instrument was executed in such form as to bind the corporation. Palmer was its president. He testified that he was not authorized to sign it for the company, and that he told the plaintiff so at the time he signed the contract. For the purpose of showing the extent of his authority as president in the making of contracts, the defendant's counsel produced the by-laws of the corporation, which were conceded to be the original by-laws of the company in force and without change since January 18, 1879, and offered them in evidence to show what authority the president had in respect to the making and execution of contracts for the corporation.

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The eleventh article of the by-laws provided "that no debt or liability except as hereinbefore provided shall be contracted by any trustees or any officer of the company, except as provided in these by-laws, and that no contract or liability shall be authorized and be the act of this company unless the same shall be first audited and passed upon by the board of trustees, except as here provided, and the evidence of such indebtedness shall be executed as provided in article fifteen."

That article declared that "a suitable seal shall be provided which shall be under the charge of the president and treasurer, and the affixing of the seal to contracts and instruments, together with the signature of the president and secretary or treasurer shall bind the company."

The plaintiff's counsel objected to the admission of these by-laws on the ground "that inasmuch as defendant's counsel states that he does not propose to show notice to us, the proof offered was immaterial, irrelevant, and not evidence against the plaintiff." The objection was sustained, and the evidence excluded, and the defendant excepted. We are unable to see any ground upon which the exclusion of this evidence can be sustained. The defendant clearly had a right to show, if it could, that the contract was not authorized by the corporation and not so executed as to bind the corporation. The president of the company was an agent having a special power and authority declared and defined by the by-laws of the corporation. All persons dealing with him in the matter of the corporation are bound to take notice of the nature and extent of his authority when he assumed to act as president of the corporation in making any contract; and it was certainly competent to put in evidence the by-laws of the corporation for the purpose of showing the extent of his authority.

The objection was not well taken and should have been overruled, and the exception raises, in our opinion, a point fatal to the judgment. The rule on this is an extremely well settled one as will be found by reference to numerous authorities (*Adrianse* agt. *Roome*, 52 *Barb.*, 399; *Dabney* agt.

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Stephens, 10 *Abb.* [N. S.], 39; *Risley* agt. *I. B. and W. R. R.*, 1 *Hun.*, 202; *Alexander* agt. *Caldwell*, 83 *N. Y.*, 480).

The court of appeals state the rule as follows: "Everyone knows that corporations are artificial creations existing by virtue of law and organized for purposes defined in their charters, and he who deals with one of them is chargeable with notice of the purpose for which it was formed, and when he deals with agents or officers of one of them he is bound to know their powers and the extent of their authority. Corporations, like natural persons, are bound only by acts and contracts of their agents done and made within the scope of their authority." The by-laws of the corporation were therefore competent evidence for the purpose of showing what power had been conferred upon its president as its special agent. It was, we think, error to exclude them.

It is not necessary to consider the other numerous exceptions in the case, most of which were of no importance. Allusion should be made to one, which presents, we think, a fatal error. At the close of the testimony the counsel for the defendant submitted to the court a volume of requests to charge, unreasonable and unnecessary in number. In charging the jury the court did not embody all these requests and the defendant's counsel after taking some exceptions to the charge said, "I desire to call your honor's attention to certain propositions embodied in the written request to charge which I have submitted." At this point the court interfered, saying, "I decline to charge further than I have already." The defendant excepted. We think it was an erroneous disposition of the matter. The counsel was attempting to call attention to certain propositions embodied in the request to charge. He was not asking to charge the whole as a body and he was entitled to distinguish and point out the specific part he desired to have charged. The court prevented him from doing this, and this deprived him of what seems to us to have been a clear legal right.

In *Chapman* agt. *McCormack* (86 *N. Y.*, 479), the counsel

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said, "I want to ask the court * * * * *
and the counsel excepted."

In reversing the judgment the court of appeals said: "It may be, * * * * * a subject of exception, * * * * * to be submitted to the jury." We think the counsel is entitled to select from his numerous requests, that had been already handed up, either or any upon which he thought the court had not sufficiently or properly charged, for the purpose of procuring a charge thereon, or availing himself of a distinct exception if it were refused and the mode of disposing of his requests was equivalent to an absolute refusal to permit him to do that on the evidence in the case. There were questions of fact to be submitted to the jury, especially upon the question of ratification of the contract by the corporation.

The judgment should be reversed and a new trial ordered, with costs to abide the event.

N. Y. COMMON PLEAS.

JAMES WALSH, respondent, agt. CHARLES SCHULZ, impleaded,
appellant.

Bail — Exoneration of — When cannot be granted after answer — Code of Civil Procedure sections 600, 601.

The Code as it exists when the application to exonerate bail is made, governs, and not the Code as it existed when the undertaking was entered into.

The right of the bail to be exonerated upon the death of the defendant is limited to cases where such death occurs before the expiration of the time to answer in the action brought against the bail (*Affirming S. C.*, 67 *Hou.*, 173).

General Term, March, 1885.

Before DALY, C. J., LAERMORE and VAN HOESEN, JJ.

APPEAL from an order of the general term of the city court affirming an order made by Mr. justice McADAM, denying a motion to exonerate bail.

Charles Wehle, for appellant.

James Flynn, for respondent.

DALY, C. J.—It is not the Code as it existed when the undertaking was entered into, but the Code as it was when the application was made to exonerate the bail, that is to govern, and the interpretation put upon the amended sections 600 and 601 by judge McADAM is so obvious that I have nothing to add. If the legislature, as the appellant argues, in these amended sections, intended that the courts should have power to relieve the bail, whenever the death of the defendant occurs, pending the suit against the bail, as was the case under section 191 of the former Code, it is presumed that they would have left the provision as it was, it being the part of wisdom to leave what is well enough alone; but they have recast the previous provision, and limited the right of the bail to be exonerated upon the death of the defendant to the case of his death before the expiration of the time to answer in the action brought against the bail, and if any other construction is to be put upon the plain language of sections 600 and 601 that responsibility must be assumed by the tribunal of final resort.

The order appealed from should be affirmed.

LARREMORE and VAN HOESEN, JJ., concurred.

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SUPREME COURT.

AUGUSTUS B. DE BOST, respondent, agt. ALBERT PALMER
COMPANY, appellant.

*Code of Civil Procedure, section 756 — Proceedings upon transfer of interest —
Power of court upon motion to compel transferee of plaintiff's claim
pending suit to be made party plaintiff.*

The court has power, upon application of defendant to compel the sole transferee of plaintiff's claim pending suit to be made party plaintiff, changing the rule as declared in *Packard agt. Wood* (17 Abb., 318); *Emmett agt. Bowers* (23 How., 300); *Howard agt. Taylor* (6 Duer, 304); affirming the theory of *Shearman agt. Coman* (23 How., 517).

First Department, General Term, May, 1885.

Before DAVIS, P. J., BRADY and DANIELS, JJ.

APPEAL from order denying motion to bring in party plaintiff.

Pending suit the plaintiff transferred his entire cause of action to Henry Day. The defendant made a motion, under section 756 of the Code of Civil Procedure, for an order directing Henry Day to be substituted as party plaintiff. The court duly denied the motion on the ground of want of power, following *Packard agt. Wood*.

James B. Dill, for the appellant, argued that the order was not discretionary with the court; that section 449 of the Code of Civil Procedure provides that "every action must be prosecuted in the name of the real party in interest," and where a party transferred his entire interest he ceased to be the real party in interest; that section 756 of the Code permitted the original party to carry on the suit unless the court ordered the transferee to be substituted; that *Shearman agt. Coman* (22 How. Pr., 517), although overruled in *Packard agt. Wood*, was the proper theory of the law; that the force of the

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decision in *Packard* agt. *Wood* had been removed by an amendment to the Code (*Sec. 756, formerly sec. 121*).

Alexander & Green, opposed, for the plaintiff, argued :

I. That the court had no power to compel the transferee of a cause of action *pendente lite* to be made party plaintiff ; that the order could only be made upon the application of the transferee (*Citing Packard* agt. *Wood*, 17 *Abb. Pr.*, 322 ; *Slawson* agt. *Watkins*, 95 *N. Y.*, 369 ; *Emmet* agt. *Bowers*, 23 *How. Pr.*, 300 ; *see note, Bliss' Code*, p. 638).

II. Section 756 has not changed the effect of the decision in *Packard* agt. *Wood*.

III. The defendant's proper remedy is given by section 3247 of the Code.

BY THE COURT (DANIELS, J.)—In this case section 756 seems to confer a very broad discretion on the court, without any qualification whatever, to bring in a party who may have an interest in the suit. It has not been made conditional that the motion should be made on behalf of the plaintiff, but a general power is given to the court to bring in a party in the exercise of its discretion. That discretion has not been made in this case.

The order must be reversed in order that the court may exercise the power that the Code has conferred upon it.

NOTE.—Upon a rehearing of the motion before LAWRENCE, J., at special term, the motion was granted on the ground that while section 756 of the Code of Civil Procedure gave the court discretionary power, when a case was made out under section 449 by proof of an absolute transfer, then as a matter of *right* the defendant was entitled to the order.—[ED.]

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SUPREME COURT.

THOMAS W. JONES agt. JANE JONES, ELIZABETH GARMON and
CATHERINE OWEN.

Will — Construction of — By whom action to determine the effect and meaning of a devise of real estate may be brought — Code of Civil Procedure, section 1866 — Mohawk river — The title thereto.

By the provisions of section 1866 of the Code of Civil Procedure a devisee in a will is vested with the right to bring his action to determine the true effect and meaning of a devise to him of real estate; and he has a right to require, by action brought for that purpose, the judgment of the supreme court, as to the intent and meaning of a testator in making a testamentary disposition of real estate, so far as the same involves the interests of the devisees.

The Mohawk river is a navigable stream, and the title to the bed of the river is in the people of the state, and the decedent's title to land described as extending to the "Mohawk river" extends only to its bank.

Oneida Special Term, March, 1885.

THIS action is brought by the plaintiff, as devisee and heir-at-law of William Jones, against the defendants, also his devisees and heirs-at-law, for the purpose of determining the construction and effect of certain devises of real estate to each, under the last will and testament of said William Jones. William Jones, then a resident of the county of Oneida, died in the month of January, 1884, leaving a last will and testament, and also leaving him surviving, the parties to this action, his children and heirs-at-law. After his death the will was duly proven before the surrogate of Oneida county, as a will of real estate, and duly recorded as such in the office of the clerk of said county. At the time of his death the decedent was the owner in fee and died seized and possessed of certain real estate situate in the town of Marcy, in said county of Oneida, and lying between and south of the highway leading from Deerfield to Rome and the Mohawk river. He acquired title to the same in two parcels, one of thirty-two acres and

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one of seventy-five. It is admitted by the answer that the description of each is correctly set forth in the complaint. The grant in one case runs to the Mohawk river, and thence along the same for its southern boundary. The second parcel is bounded on the south by the Mohawk river. The total amount of lands is 107 acres, and comprises the farm and homestead of the decedent, and upon which he lived at the time of his death. The eastern boundary of the premises is designated as the Miller line, or line between lands known as the Miller land, and the lands in question. This line is an original lot line, crossing the Deerfield road, and extending from it southerly to the Mohawk river. The decedent, William Jones, by his said last will, devised said real estate to his said children as follows: To his daughter Jane Jones, he gave twenty acres, and described the same as lying south of the center of said highway, also called the river road, and runs down to the Mohawk river, and adjoins on the west what was the "Miller lot." To his daughter Elizabeth Garmon, he gave twenty acres, lying west of the above twenty acres, and adjoining the same, and running from the center of said road to said river. To his daughter Catherine Owen he also gave twenty acres, lying on the westerly side of the lands above devised to his daughter Elizabeth, and adjoining the same, and running from the center of said road to said river. He gave and devised to his son Thomas W. Jones, the plaintiff, during and for the term of his natural life, the rest, residue and remainder of his farm and lands upon which he then resided on said road, and after his death he gave the fee to his (said Thomas') children.

No question is made as to a defect of parties. Indeed that question is especially waived by the defendants. The plaintiff seeks to establish the boundaries of the respective twenty acres given to his sisters, and to do this two questions are presented.

First. Did the land of the decedent, at the time of his death, extend to the center of the Mohawk river, and if so, is the river bed included in the several devisees to his three daughters?

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Second. In giving the respective twenty acres to his daughter, did he intend, and should the number of acres be ascertained by running the westerly line of each, parallel with the above mentioned "Miller line," and extending thence to the center of said river.

D. U. Stoddard, for plaintiff.

Joseph S. Avery, for defendant.

KENNEDY, J.—The defendants waive any defect of parties. I am of the opinion that the remainderman after the termination of the life estate will be in no manner affected by the judgment in this action. It would be prudent at least to have made them parties. Yielding, however, to the wishes of the parties, I think it proper to dispose of the questions in the case at least so far as the same may relate to and affect the life estate of the plaintiff.

It is insisted by the defendants that the plaintiff, as devisee, cannot maintain this action, it being one involving the construction of the will. The plaintiff concedes that before the adoption of the Code of Civil Procedure this action could not be maintained, but he insists that by the provisions of section 1866 of said Code the right is vested in the plaintiff to bring it for the construction of, and to have adjudged the effect of the said several devises.

By chapter 238 of the Laws of 1853, as amended by chapter 316 of the Laws of 1879, it is provided that the *validity* of any actual or alleged devise or will of real estate may be determined by the supreme court in a proper action for that purpose, &c. By this provision the only action a devisee could maintain was one to determine the validity of any actual or alleged devise. Section 1866, which is a substitute for and is enacted in the place of said provision, provides "that the validity, *construction* or *effect*, under the laws of the state, of a testamentary disposition of real property situate within the state, or of an interest in such property which

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would descend to an heir of the intestate, may be determined, in an action brought for that purpose, in like manner as the validity of a deed purporting to convey real estate may be determined," &c.

I am not aware that this provision has received a judicial construction. In the absence of this I am left to give it such effect as the language imports and as the legislature manifestly intended. I am of the opinion that the added words "construction" and "effect" are to be taken and construed in their literal sense and ordinarily understood meaning; and giving them this construction it was intended to vest in a devisee a right to bring his action to determine the true effect and meaning of a devise to him of real estate, and that he has a right to require, by action brought for that purpose, the judgment of this court as to the intent and meaning of a testator in making a testamentary disposition of real estate so far as the same involves the interest of the devisees. This seems the more manifest from the subsequent language: "In the same manner as the validity of a deed purporting to convey real estate may be determined." If this construction is denied, no effect can be given to the words quoted, incorporated as new, in said section. It was manifestly the intention of the testator to give to his children, the several devisees, all the land which he owned, lying south of and between the river road and the Mohawk river. It would be unjust to assume, if he in fact owned to the center of the river, that he intended to limit the devised lands to the bank of the stream and retain the bed, which of itself was of no value and could not be rendered of avail independent of the adjoining lands for any practical purpose. The question then as to the extent of the gift must be determined by the title in the decedent as it existed at the time of his death. The complaint alleges that the decedent's title to the piece of land first described, extended to the "Mohawk river" and thence along the same. As to the second parcel it is alleged as bounded on the south by the "Mohawk river." The truth of these

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allegations is expressly admitted by the answer; and if the river was a non-navigable stream, upon the description in the grant, no question could arise but that it carried the title to the middle of the stream. It must be regarded as established, and judicial notice may be taken of the fact, that the Mohawk river is a navigable stream, and the extent of the testator's title must be determined in the light of this fact.

The question whether the bed of navigable rivers in this state remained in the people when the tide did not ebb and flow, or whether the public reservation extended only to a simple easement consisting of, and limited to, the right of passage has been the subject of much discussion, and in earlier days of considerable judicial conflict (*Tibbitts case*, 17 *Wend.*, 571; *Commissioners of the Canal agt. Kempshall*, 26 *Wend.*, 404; *Child agt. Starr*, 4 *Hill*, 369; *Walton agt. Tift*, 14 *Barb.*, 216). These and many others, apparently conflicting, came under review by the court of appeals (*In the People on the relation, &c., as Canal Appraisers*, 33 *N. Y.*, 461). Judge DAVIS there examines the authorities not only in this state but in many sister states, as well also those in England, and reached the conclusion that the doctrine of the common-law that those streams could only be regarded as navigable in a legal sense when the tide ebbed and flowed was not applicable to the inland waters of this state; but that the question was to be determined by the fact, regardless of the common-law limitations, and such was the unanimous judgment of the court. This doctrine has been frequently affirmed since, and I think may be regarded as settled (*Crill agt. City of Rome*, 47 *How.*, 398; see, also, *Seneca Nation of Indians agt. Knight*, 23 *N. Y.*, 500). This being the law the title to the bed of the Mohawk river remains in the people, and the decedent under his conveyance took only to its bank.

It is suggested by the plaintiff that in the absence of proof, and in light of the fact that the changed state of things renders the reservation of the bed in the state valueless, that a grant may be presumed. I cannot subscribe to this notion, but

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must determine the question upon the evidence as it exists, and hold that the decedent was not the owner or in possession of any part of the bed of the Mohawk river at the time of his death; and that, in ascertaining the westerly lines of the twenty acre parcels devised, the southerly lines is to terminate on the bank of the same. The devise to Jane Jones is twenty acres of land; the same lies south of the center of the highway or river road, and runs down to the Mohawk river and adjoining on the west side what was once the "Miller lot." That to Elizabeth Gannon is twenty acres, "lying on the westerly side of the lands above given to my daughter Jane and adjoining the same." That to Catherine Owen is twenty acres, "lying on the westerly side of the lands above given to my daughter Elizabeth and adjoining the same." The defendants concede that the twenty acres devised to Jane Jones is to be ascertained by running a line parallel to the Miller line, and far enough from the same to give twenty acres. It seems to me quite apparent that it was the intent of the testator to run the easterly and westerly lines of each of the twenty acre pieces parallel, and with intent to make each as near alike as possible.

It is claimed by the defendants that they, with the plaintiff, have assented to a construction of the will in reference to the location of the respective twenty acres devised, and that they have practically located the same, and that by such practical location the lines of each twenty acres running from the river road to the Mohawk, and drawn perpendicular, or at right angles to said road, instead of parallel to the Miller line.

This claim rests upon a survey made by one Edic about April, 1884. The plaintiff was present a part of the time when it was made, and conversations were had between the parties in relation to the same. By the line as run by Edic the western boundary of the twenty acres given to Catherine Owen excludes the plaintiff from the Mohawk river and deprives him of the use of its waters for agricultural or any other purpose. On the other hand, if the lines are run parallel

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to the Miller line it gives the plaintiff access to the river. The evidence that the plaintiff understood where the survey located the lines, or that by such location he was excluded from the river, is not sufficient to justify the conclusion that having requisite knowledge he assented to the survey, or that he is now estopped from claiming that the true intent of the testator should be ascertained and carried out. The paper produced by the defendants, and called an agreement between Thomas W. Jones and Catherine Owen, was never executed and delivered, and is therefore inoperative, having no binding force or effect.

Upon the trial the defendants offered in evidence deeds or mere conveyances through which the decedent derived his title, for the purpose of establishing the fact, as he claimed, that considering the grants on the Mohawk to be controlled by the common-law rule, by its application under the terms of such prior conveyances, his (decedent's) title did not extend beyond the bank of the river. This evidence was objected to by the plaintiff as inadmissible under the pleadings, and in the light of the admissions in the answer immaterial. By consent of the respective counsel the question was reserved, and such conveyances read subject to the objection.

I am of the opinion that the admissions in the answer are binding; and for the purposes of the trial ought to be held conclusive upon the defendants; and that it would not be a proper exercise of discretion by the court to permit the same to be recalled upon the trial (*Paige agt. Willet*, 38 *N. Y.*, 28; *Tell agt. Deyer*, 38 *N. Y.*, 161; 30 *N. Y.*, 110). I therefore sustain the plaintiff's objection, and the defendant is entitled to an exception, with the exclusion of evidence. The motion of the defendants to amend the answer to make it conform to the proposed evidence becomes unimportant and is denied.

Judgment is ordered in conformity to the opinion, but under the circumstances, without costs to either party.

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CITY COURT OF NEW YORK.

THE METHODIST BOOK CONCERN AND COMPANY agt. ISAAC N.
HUDSON.

*Supplementary proceedings — Practice — Issue and return of execution —
Jurisdiction.*

Want of service of process is a jurisdictional defect. If a court, whether of limited jurisdiction or not, undertakes to hold cognizance of a cause without having gained jurisdiction of the person by having him before them in the manner required by law, the proceedings are void. The jurisdiction of a court may be inquired into, although the record of the judgment states facts giving it jurisdiction. It may be disproved by evidence notwithstanding recitals in the record.

After commenting on defendant's affidavits as to service of summons, &c. : *Held*, that in view of this proof and of all the circumstances surrounding it, the affirmation of the record is entitled to greater weight as evidence establishing jurisdiction, than the negation of the defendant.

A return by a sheriff to an execution can only be impeached by direct motion to set it aside, and not collaterally.

Objections to the proper service of an order for the examination of a judgment debtor must be raised at the first opportunity. His appearance and submission must be regarded, if the order was null, as voluntary, whereby he waived objection if any to the jurisdiction of the person.

Where defendant, a judgment debtor, was examined under an order which was set aside on the ground that the execution had not been returned at that time :

Held, that as it does not appear that the first examination was concluded, otherwise than by the vacation of the order, a further examination founded upon another judgment and order cannot be considered as a second examination or as harassing.

Special Term, March, 1885.

MOTION to set aside the judgment, execution and return and a supplemental order herein, for the examination of the defendant as a judgment debtor.

W. C. Reddy, plaintiff's attorney, opposed.

A. J. Rodgers, defendant's attorney, for motion.

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HYATT, J. — The moving party confines himself to the following objections, viz: (1.) No summons was ever served. (2.) The return of the execution was made at the request of plaintiff, its attorney or agent. (3.) Without any *bona fide* attempt to discover whether the defendant had any property to levy on. (4.) The order was served without the jurisdiction of the court. (5.) The defendant has already been examined within a few days and no cause is shown for a second examination. (6.) The examination, if had, should be in open court. I will consider them *seriatim*.

First. The defendant's affidavit shows that the affidavit of service of the summons in this action, attached to the judgment-roll on file, was made by John S. Cummings and states service of the same to have been made at 21 Park Row, New York, December 27, 1875, and was sworn to on that day before Benjamin A. Mapes, a notary public for Kings county; that the certificates of the clerks of Kings and New York counties as to the fact that said Mapes was a notary, &c., are dated February 7, 1885, and attached to the said affidavit; that the Western Methodist Book Concern recovered a judgment against him December 23, 1875, upon an affidavit sworn to by said Cummings to the effect that he served the summons in that case at 21 Park Row.

It is not claimed that these two actions were identical or for the same cause of action, and no pretense of fraud or collusion between the plaintiff and the affiant in any respect is alleged. The defendant swears: that "I remember the service of the summons in the case of the Western Methodist Book Concern, but have no recollection of the service of the summons in the other case, and if it had been served I have no doubt whatever that I should remember it just as well as I remember the other. I have no hesitation, therefore, in swearing that said summons was never served upon me. I am fortified in this by the fact that the twenty-seventh being two days only after Christmas, and being on a Monday, I was not at 21 Park

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Row, which was my place of business, on that day, being unwell and at home."

Want of service of process is a jurisdictional defect. In *Bigelow agt. Stearns* (19 *Johns.*, 41), SPENCER, C. J., laid down the broad rule, that if a court, whether of limited jurisdiction or not, undertook to hold cognizance of a cause without having gained jurisdiction of the person by having him before them in the manner required by law, the proceedings are void. It is a general principle that the jurisdiction of a court may be inquired into, although the record of the judgment states facts giving it jurisdiction (*Harrington agt. People*, 6 *Barb.*, 607; *Noies agt. Butler*, 6 *Barb.*, 613, 617). It may be disproved by evidence notwithstanding recitals in the record (*Adams agt. The Saratoga and Washington R. R. Co.*, 10 *N. Y.*, 328, 333).

In the case at bar, it is fair to assume that the defendant has presented the full extent of his inquiry, in its strongest aspect, and it appearing by the affidavit of the plaintiff that the party who made the affidavit of the service of the summons cannot be found and produced for examination, it follows that all possible proof bearing upon the question of jurisdiction is probably before the court. In view of this proof, and of all the circumstances surrounding it, I consider the affirmation of the record to be entitled to greater weight, as evidence establishing jurisdiction, than the negation of the defendant.

Second and Third. Admitting that the return of the execution was made at the request of the plaintiff's attorney (he swears that he did so request only if the sheriff could find no property of the defendant), the sheriff swears that he received the execution February seventh, and returned it February tenth, and after making diligent search was unable to find any property belonging to the defendant. The rules which govern in the supreme court of the first district and in the common pleas are that the return can only be impeached by direct motion to set it aside, and not collaterally upon these pro-

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ceedings (*Spirling* agt. *Levy*, 10 *Abb.*, 426; *Owen* agt. *Dupignac*, 9 *Id.*, 180; *Forbes* agt. *Waller*, 25 *N. Y.*, 430; opinion of *SMITH, J.*, on this point).

Fourth. Whether or not the order can be served outside of the territorial jurisdiction of this court seems to depend upon whether or not these proceedings are in the original action; diversity of opinion appears to exist upon this question; but whatever may be the rule it cannot apply in this case, for the reason that the debtor has waived this objection to the proceedings by not raising it at the first opportunity (*Bingham* agt. *Disbrow*, 37 *Barb.*, 24). The referee certifies that the judgment debtor appeared on the return day and hour of said order, that he was sworn and his examination postponed by successive adjournments; and there is no proof that he made any protest or objection to the regularity of the proceedings. The court had jurisdiction of the subject-matter; the objection was personal with the debtor; his appearance and subiniasion must be regarded, if the order was null, as voluntary, whereby he waived objection, if any, to the jurisdiction of the person.

Fifth. It appears by the defendant's affidavit that in the action in which the Western Methodist Book Concern was plaintiff, he was examined as the judgment debtor under an order therein made and served January 29, 1885, and that said order was set aside on the ground that the execution had not been returned at that time. While it is true that a judgment creditor will not be permitted to harass his debtor by successive examinations in supplementary proceedings, and that the rule is the same, even if the second application is founded upon another judgment (*Canavan* agt. *McAndrew*, 20 *Hun*, 46), yet it does not appear that the first examination was concluded, otherwise than by the vacation of the order as aforesaid; this examination, therefore, cannot be considered as a second examination or as harassing.

Sixth. Considering the facts disclosed as far as the first examination went, and the debtor's affidavit that he has no property, I think it but just that the costs of this proceeding

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should not be augmented unnecessarily, and that, therefore, the examination should be in open court.

Motion denied; let the order provide that the examination continue in open court.

COUNTY COURT.

ADAM C. MILLARD agt. ALMIRA SEVERANCE.

Action or special proceeding relating to animal straying upon highway — Code of Civil Procedure, sections 3096, 3108—Proceedings upon decision in favor of person answering — When action cannot be maintained by person to whom precept is directed, and who is personally served and appears and answers in the special proceeding.

In proceedings under chapter 19, title 10 of the Code of Civil Procedure, relating to an animal straying upon the highway, where the person to whom the precept was directed by name is personally served or appears and answers, the theory of the statute is to give him damages, where he succeeds upon the trial of the issue *only* when the seizure is found to be malicious and without probable cause, and only then in the special proceeding where the issue is decided in his favor. All the issues are to be determined in one special proceeding, and not a part tried in a special proceeding and a part in an action.

Where, as in this case, the precept was directed to the plaintiff in this action by his name and he was personally served, and he appeared and answered, unless the justice found that the seizure was malicious and without probable cause, he was not entitled to recover any damages under the statute, as section 3108 expressly excludes him from maintaining such an action.

Allegany county, March, 1885.

THIS action was commenced in justices' court to recover of the defendant damages upon a horse, sustained by the plaintiff while the horse was in the possession of the defendant. In July, 1884, this defendant, under chapter 19, title 10 of the Code of Civil Procedure, made a petition which was duly filed with the proper officer that the horse in question was running at large in the public highway. Thereupon the justice before

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whom the matter was laid issued a precept directed to, and which was duly served upon the plaintiff herein requiring him to show cause, &c. This plaintiff appeared and filed a written verified answer denying the allegations of the petition, and an issue was there joined which was thereafter tried by the justice, and he decided the issue in favor of the person there answering, and awarded the return of the animal to this plaintiff, with three dollars and five cents costs. Shortly thereafter this plaintiff commenced an action in justices' court, while the horse was yet in the possession of the defendant, for its conversion and for the conversion of the harness upon the horse at the time it was taken up by the defendant; issue was joined in that action, and a few days before the adjourned day the defendant, by her agent, paid the plaintiff in this and that action a certain sum of money, and that action was then discontinued. The defendant caused the horse and harness to be delivered to the plaintiff, and he accepted them without objection. About a month after that time the plaintiff commenced this action. The defendant appeared herein and answered, and plead a former suit in bar, and an accord and satisfaction arising from the foregoing facts. The justice rendered judgment herein in favor of the plaintiff for fifteen dollars damages and costs. Upon this appeal the defendant, appellant, claims this judgment should be reversed on two grounds:

First. That the final order in the "stray" proceeding is a bar; and,

Second. That the settlement of the former action is a bar.

These are the only points raised in the case and the only ones needing examination.

G. W. Tibbetts, for appellant.

E. E. & G. W. Harding, for respondent.

C. A. FARNUM, Co. J.—Section 3096 of the Code provides that "if the decision of the justice, or the verdict of the jury,

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where the issues are tried by a jury, is in favor of the person answering, it must fix the value of each animal seized. If the justice or the jury find that the seizure was malicious and without probable cause, the decision or verdict must assess the damages sustained by the person answering by means of the seizure and detention. The justice must thereupon make a final order awarding to the person so answering the return of the animal or animals so seized, or the value thereof if a return cannot be had, together with his costs, at the rates allowed by law in an action brought before him to recover a chattel, and also twice the sum assessed as his damages, if any."

Section 3108, expressly provides: "A person to whom the precept was directed by his name, and who was personally served therewith, or a person who has appeared and answered in the special proceeding or demanded the return of any animal seized, cannot maintain an action against the officer or other person seizing an animal, or a person acting by his command, or in his aid, in a case specified in the last section." It then provides that *any other* person being the owner of an animal so seized may maintain an action to recover the animal or its value, or damages for the seizure or detention, &c., if, in fact, the animal was not running at large at the time of the seizure.

Where the person to whom the precept was directed by name, is personally served or appears and answers, the theory of the statute is to give him damages where he succeeds upon the trial of the issue *only* when the seizure is found to be malicious, and without probable cause, and only then in the special proceeding where the issue is decided in his favor. All the issues are to be determined in one special proceeding, and not a part tried in a special proceeding and a part in an action.

Where the precept is not directed to a person by name and he is not personally served, &c., in a proper case he may recover his damages by action. Such is not this case. Here the precept was directed to the plaintiff in this action by his name; he was personally served; he appeared and answered,

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and unless the justice found that the seizure was malicious, and without probable cause, he was not entitled to recover any damages under the statute. Section 3108 expressly excludes him from maintaining such an action. This court is not called upon to pass its opinion upon the wisdom of the statute in question. Its duty is simply to construe the sections cited. Having ascertained the intention of the legislature, it must direct that intention to be carried out. Reading sections 3096 and 3108 of the Code, they are not found to be in conflict in the slightest degree. They provide who may and who may not have an action for damages where animals have been illegally seized under the "stray" act. An examination shows that the plaintiff is not one entitled to maintain such an action, and that the justice ought to have rendered a decision and judgment in favor of the defendant.

The respondent contends that the statute is unconstitutional, and that he cannot be deprived of his right to recover his damages sustained by reason of the unlawful act of the defendant without having his "day in court." Bearing in mind the well settled rule that courts will not declare a statute to be unconstitutional unless it clearly appears to be so it would not seem becoming in this court to hold with him upon this point. There is also a grave question whether the justice ought not to have held upon the uncontradicted evidence, that there had been an accord and satisfaction and settlement of this cause of action before this action was commenced.

This judgment should be reversed upon the point discussed and an order may be entered accordingly.

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COURT OF APPEALS.

FREDERICK ZOELLER, appellant, agt. JULIA A. RILEY, administratrix, respondent.

Practice — Appeal — Code of Civil Procedure, section 191 — Matter in controversy within the meaning of this section.

Where the action is not founded upon contract the sum for which the complaint demands judgment is deemed to be the amount of the "matter in controversy" within the meaning of section 191 of the Code of Civil Procedure, which prohibits an appeal when the matter in controversy is less than \$500.

Decided March, 24, 1885.

MOTION to dismiss appeal from judgment of the general term of the city court of Brooklyn affirming judgment of trial term dismissing plaintiff's complaint. The action was brought for the conversion of a carriage alleged to be worth \$500, for which sum the complaint demanded judgment. On the trial the only evidence as to value was that the carriage was worth about \$300. The complaint was dismissed and plaintiff appealed. On the motion it was claimed by respondent that the matter in controversy was the value of the chattel as disclosed by the motion, and as that was less than \$500, the judgment was not appealable to the court of appeals. Appellant claimed that the value of the chattel as alleged in the complaint, and for which judgment was demanded, was the matter in controversy within section 191, subdivision 3, of the Code of Civil Procedure, and that the testimony on the trial could not be considered in fixing the matter in controversy. The court held with appellant, and handed down the following opinion, in which all the judges concur.

Thomas E. Pearsall, for motion.

James D. Bell, opposed.

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PER CURIAM. — This action is not founded upon contract, and hence the sum for which the complaint demands judgment is deemed to be the amount of the matter in controversy within the meaning of section 191 of the Code. Here the complaint demands judgment for \$500. It matters not that proof given upon the trial shows that the plaintiff's damages were less. If he can succeed upon his appeal upon a new trial it will be open to him to show that this property was worth \$500 or more, if he can.

The motion must be denied, with ten dollars costs.

D I G E S T

CONTAINING THE WHOLE OF

1 HOWARD (NEW SERIES), ANTE, AND QUESTIONS OF PRACTICE CONTAINED IN 33 AND 34 HUN, AND 96 AND 97 NEW YORK REPORTS.

Attention is called to the four additional headings "CODE OF CIVIL PROCEDURE," "CODE OF CRIMINAL PROCEDURE," "CODE OF PROCEDURE," and "PENAL CODE," under which (for the convenience of the reader) will be found collated decisions bearing upon the various provisions of the Codes.

ABATEMENT AND REVIVAL

1. Where pending proceedings for the judicial settlement of the account of an administrator, such administrator dies, the proceedings abate and cannot be revived against his legal representatives. (*In the Estate of Washington M. Smith, ante, 64.*)
2. By section 2606 of the Code of Civil Procedure, as amended in 1894, the surrogate can require an accounting from a representative of a deceased executor or administrator, just as he might require it from the deceased executor or administrator himself after the revocation of his letters. Therefore where an administrator dies pending proceedings for the settlement of his accounts, in a new proceeding, his legal representatives can be directed to render a full account of such administrator's management of decedent's estate. (*Id.*)
3. Action for personal injuries — it abates upon the death of the plaintiff — the recovery of a verdict by him will not make it survive if it be reversed on appeal — Code of Civil Procedure, sec. 764. (*Kelsey agt. Jewett, 34 Hun, 11.*)

ABDUCTION.

See CRIMINAL TRIAL.

The People agt. Platt, ante, 402.

ACKNOWLEDGMENT.

See WILL.

Matter of the Petition of Phillips agt. Phillips, ante, 291.

ACTION.

1. A bill against the personal representatives of a deceased person to impress a lien upon the decedent's real estate cannot be joined with an action under the statute against his heirs and their grantees. (*Howard agt. McDonald et al., ante, 229.*)

ADDITIONAL ALLOWANCE.

1. Upon what it is to be computed in an action to restrain the enforcement of a final determination in summary proceedings. (*See Sheehy agt. Kelly, 33 Hun, 543.*)
2. Surrogate — when he cannot grant an allowance to a special guardian upon his *ex parte* application therefor — the provision as to costs and allowances should be inserted in the decree — Code of Civil Procedure, sec. 2538. (*See Matter of Budlong, 33 Hun, 235.*)
3. When in an action for dower it should not be allowed. (*See McKeen agt. Fish, 33 Hun, 28.*)

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ADMINISTRATOR.

1. Where pending proceedings for the judicial settlement of the account of an administrator, such administrator dies, the proceedings abate and cannot be revived against his legal representatives. (*In the Estate of Washington M. Smith, ante, 64.*)
2. By section 2806 of the Code of Civil Procedure, as amended in 1884, the surrogate can require an accounting from a representative of a deceased executor or administrator, just as he might require it from the deceased executor or administrator himself after the revocation of his letters. Therefore where an administrator dies pending proceedings for the settlement of his accounts, in a new proceeding, his legal representatives can be directed to render a full account of such administrator's management of decedent's estate. (*Id.*)

AFFIDAVIT.

1. An averment in an affidavit for an attachment made by a plaintiff, "that a cause of action exists in favor of plaintiffs against said defendants for which said action is commenced, and that the amount of plaintiff's claim in said action is \$283.20, and interest from the 15th day of April, 1883, over and above all counter-claims and set-offs known to deponent," is a compliance with the requirement of section 686 of the Code of Civil Procedure, that plaintiff must show by affidavit that he is entitled to recover a sum stated therein, over and above all counter-claims known to him, and is sufficient to give the judge jurisdiction to grant the warrant. (*Barton agt. Saalfeld, ante, 276.*)

See ATTACHMENT.

Knudson agt. Matuska & Craig Furniture Company, ante, 152.
Mallory agt. Allen, ante, 316.
Bates agt. Pimstein, ante, 335.

See ARREST.

Stroub agt. Henly, ante, 400.

See EXAMINATION BEFORE TRIAL.

Kaufman agt. Herzfeld, ante, 445.

ALIENS.

1. Upon the marriage of an alien widow with a naturalized citizen of the United States, she, as well as her infant children residing in this country become *ipso facto*, naturalized citizens of the United States; and as such, entitled to all the rights and privileges of said citizenship as fully as though naturalized by the judgment of a court of competent jurisdiction. (*The People agt. Newell, ante, 8.*)
2. Various statutes and authorities on the subject of naturalization reviewed and commented on. (*Id.*)

AMENDMENT.

1. Practice — power of the court to allow amendments to be made *nunc pro tunc* — Code of Civil Procedure, sec. 723. (*Tobin agt. Cary, 34 Hun, 431.*)
2. Where the court has power to order a complaint to be amended and other parties brought in, it is not bound to exercise that power, and may dismiss the complaint without prejudice to the right to bring another action. (*Knapp agt. McGowan, 96 N. Y., 75.*)
3. *It seems* that even a clerical error, if it affects the substantial rights of a party, will not be corrected by the courts without notice to him, and that for such full and regular period as the law prescribes. (*People ex rel. Chamberlain agt. Forrest, 96 N. Y., 544.*)
4. The supreme court has power, notwithstanding an appeal to this court, to make its record declare

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the truth as to its judgment, and so may, after an appeal, amend an order reversing a judgment entered on the report of a referee by adding a statement that the reversal was upon the facts as well the law. (*Nat. City Bk. agt. N. Y. Gold Ex. Bk., 97 N. Y., 645.*)

5. When trial court may amend complaint by increasing the amount of damages claimed. (*See Reed agt. Mayor, etc., 97 N. Y., 630.*)

ANIMALS.

1. In proceedings under chapter 19, title 10 of the Code of Civil Procedure, relating to an animal straying upon the highway, where the person to whom the precept was directed by name is personally served or appears and answers, the theory of the statute is to give him damages, where he succeeds upon the trial of the issue *only* when the seizure is found to be malicious and without probable cause, and only then in the special proceeding where the issue is decided in his favor. All the issues are to be determined in one special proceeding, and not a part tried in a special proceeding and a part in an action. (*Millard agt. Severance, ante, 521.*)
2. Where, as in this case, the precept was directed to the plaintiff in this action by his name and he was personally served, and he appeared and answered, unless the justice found that the seizure was malicious and without probable cause, he was not entitled to recover any damages under the statute, as section 8108 expressly excludes him from maintaining such an action. (*Id.*)
- specifically admitted, controverted or denied is sufficient. (*Spiaga agt. Thompson, ante, 139.*)
2. In an action against an assessment insurance company, brought by a beneficiary to recover on a certificate of membership, where the defendant's answer alleged new matter, *i. e.*, the making and non-payment of an assessment: *Held*, that, under section 516 of the Code of Civil Procedure, on motion of defendant's counsel, the court will require the plaintiff to reply to the new matter set up in defendant's answer. (*Rogers agt. Mutual Reserve Fund Life Association, ante, 194.*)
3. A denial in an answer on information and belief of each and every allegation in said complaint constituting the plaintiffs' first alleged cause of action, is subject to a motion under section 538 of the Code of Civil Procedure to strike out as sham where it appears by uncontradicted proof that the defendant must have personal knowledge of the allegations he denies "on information." (*Sherman agt. Boehm, ante, 278.*)
4. If the allegation is untrue because the averments of the complaint are of personal transactions, the remedial provision of section 538, permitting sham defenses to be stricken out on motion, should be applied and the decision in *Wayland agt. Tyson* (45 N. Y.) should not be extended to cover the case. (*Id.*)
5. The complaint contained the usual allegations to charge the drawer and acceptor of a draft. The only denial in the answer of the defendant sued as the acceptor was, "denies each and every allegation therein contained not hereinafter specifically admitted, controverted or denied: *Held*, that such a denial was neither a general nor specific denial, and, therefore, no denial.

ANSWER.

1. A denial in an answer of each and every allegation not hereinafter

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and that consequently all the allegations of the complaint were admitted, and that the referees erred in dismissing the complaint for want of proof that the defendant who was sued as acceptor had accepted the draft.

Held, also, that a statement in the answer admitting the acceptance "of a draft similar to the one set forth in the complaint" was an admission of the acceptance of the draft sued on. (*Millville Manufacturing Company agt. Salter*, ante, 495.)

APPEAL.

1. An appellant is only required to file the return and serve the printed cases. The respondent, if he wishes to expedite the case, can himself put it upon the calendar and notice it for argument. (*Nichols agt. McLean*, ante, 370.)
2. Where an appeal is allowed by the common pleas from a judgment of the city court, the notice of appeal should specify that the appeal is from the order or judgment of the common pleas, as there can be no appeal to the court of appeals from the city court. (*Ansonia Brass and Copper Company agt. Connor et al.*, ante, 499.)
3. Where the action is not founded upon contract, the sum for which the complaint demands judgment is deemed to be the amount of the "matter in controversy" within the meaning of section 191 of the Code of Civil Procedure, which prohibits an appeal when the matter in controversy is less than \$500. (*Zoeller agt. Riley*, ante, 535.)

See SURETIES.

Hooker agt. Townsend, ante, 107.

See BILL OF PARTICULARS.

Longden agt. Brown, ante, 338.

See JURISDICTION.

Matter of the Several Accountings etc., of William Tilden, deceased, ante, 409.

See SURREGATE.

In the Estate of James Tilby, ante, 452.

4. Undertaking on appeal — when the guaranty of a corporation will be accepted in the place of sureties — 1881, chap. 486 — Code of Civil Procedure, secs. 1334, 812. (*Hurd agt. Hannibal and St. Joseph R. R. Co.*, 33 Hun, 109.)
5. Appeal — when the general term may order a judgment for the appellant without directing a new trial. (*Price agt. Price*, 33 Hun, 432.)
6. A party voluntarily withholding evidence will not be granted a new trial, in order to enable him to introduce it. (*Id.*)
7. Appeal — none lies to a court of sessions from a judgment of the special sessions charging a prosecutor with costs — Code of Criminal Procedure, secs. 719, 720, 749 — Code of Civil Procedure, secs. 3044, 3045. (*People agt. Norton*, 33 Hun, 277.)
8. Improper assessment of tax — application to county judge to have it refunded — an appeal lies from his order to the general term — Code of Civil Procedure, sec. 1357 — 1869, chap. 855, sec. 5, as amended by chap. 695 of 1871 — 1884, chap. 141. (*See Harris agt. Supervisors of Niagara Co.*, 33 Hun, 279.)
9. Practice — where a notice of appeal is signed by an attorney, other than the attorney of record, the objection should be raised by a motion to dismiss the appeal. (*See Thierry agt. Crawford*, 33 Hun, 336.)

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10. Drainage of swamps—no appeal lies from an order directing a further assessment—when an assessment may be laid before the title to the easement has been acquired—1881, chap. 608. (*See Matter of Swan*, 33 Hun, 200.)
11. Motion for a new trial on the minutes—when an appearance and consent estops a party from denying the regularity of a motion, or the jurisdiction of the court to hear it—power of the court to reconsider a decision during the circuit at which it was made. (*See Emmerich* agt. *Hefferan*, 33 Hun, 54.)
12. Report of commissioners to appraise damages on taking land for a railroad—appeal from the order confirming the report—errors in the minutes of the testimony must be corrected by an application to the commissioners and not to the court. (*See Matter of N. Y., W. S. and B. R. R. Co.*, 33 Hun, 298.)
13. Taking of land for railroad purposes—an order of the special term setting aside the report of commissioners is reviewable at the general term. (*See Matter of N. Y., W. S. and B. R. R. Co.*, 33 Hun, 281.)
14. Railroads—proceedings by one company to acquire a right to cross the tracks of another—the proceedings are not stayed by an appeal from an order refusing to change the venue. (*See Matter of N. Y., L. and W. R. R. Co.*, 33 Hun, 270.)
15. Undertaking upon appeal—a surety thereto is not discharged because an action against a co-surety is barred by the statute of limitations. (*Staples* agt. *Gokey*, 34 Hun, 289.)
16. What defects in the undertaking do not relieve the surety from liability. (*Id.*)
17. Undertaking on appeal—when invalidated by the refusal of the sureties to justify—Code of Civil Procedure, sec. 1335. (*Hoffman* agt. *Smith*, 34 Hun, 485.)
18. Code of Civil Procedure, sec. 191, sub. 8—power to allow an appeal under—by what general term it must be exercised. (*De Freest* agt. *City of Troy*, 34 Hun, 580.)
19. Practice—appeal from an order of the general term modifying a peremptory writ of mandamus—Code of Civil Procedure, secs. 190, 191, 1856, 2070. (*People ex rel. Collins* agt. *Spicer*, 34 Hun, 584.)
20. Settlement of a case. (*Gleason* agt. *Smith*, 34 Hun, 547.)
21. When an order denying a motion for a resettlement is appealable. (*Id.*)
22. Undertaking on an appeal in bastardy proceedings—form of it—Code of Criminal Procedure, sec. 851—the court of sessions cannot allow it to be amended when defective. (*See Ramsey* agt. *Childs*, 34 Hun, 329.)
23. Appeal from a judgment convicting a defendant of murder in the first degree—duty of the appellate court to grant a new trial if the verdict be against law or if justice requires a new trial—when the expense of preparing the case will be charged upon the county. (*See People* agt. *Jones*, 34 Hun, 620.)
24. County courts—may entertain motions for new trials made upon the minutes of the judge—an appeal lies from orders made thereon to the general term—no question will be considered by the general term that does not appear from the appeal book to have been presented to the county court—error, in entering such an order without stating the grounds upon

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- which it was made, is to be corrected by motion, and not by appeal—motion for a new trial—how made. (*See Hensman agt. Stilwell*, 84 Hun, 178.)
25. Action for personal injuries—it abates upon the death of the plaintiff—the recovery of a verdict by him will not make it survive if it be reversed on appeal—Code of Civil Procedure, sec. 764. (*See Kelsey agt. Jewett*, 84 Hun, 11.)
26. Costs—when to be allowed, as of course, to a successful appellant, on appeal from a judgment of dispossession in summary proceedings—Code of Civil Procedure, secs. 2280, 3066, 3240. (*See Harrison agt. Swart*, 84 Hun, 259.)
27. Action of ejectment—recovery of possession by the plaintiff, under a judgment which is reversed on appeal—right of the defendant to be placed in possession again—Code of Civil Procedure, sec. 1526. (*See Conger agt. Duryea*, 34 Hun, 560.)
28. A new trial cannot be had in the county court on an appeal from a judgment in summary proceedings—Code of Civil Procedure, secs. 2260, 3068. (*See Brown agt. Cassidy*, 84 Hun, 55.)
29. Frivolous answer—what is—an order denying a motion to strike out an answer as frivolous is not appealable. (*See Carpenter agt. Adams*, 84 Hun, 429.)
30. Where an order of general term deciding an appeal refers to the opinion for the grounds of its judgment the opinion may be looked to to ascertain those grounds. (*Snyder agt. Snyder*, 96 N. Y., 88.)
31. While this court will not review an order denying a motion to vacate an order of arrest obtained upon the theory of a fraudulent contraction of a debt, when the facts and circumstances proved, or the legitimate inferences therefrom, tend to establish the existence of a fraudulent intent, yet when there is no evidence legitimately tending to establish such a conclusion, and the natural inferences to be drawn from the facts proved do not necessarily lead to the presumption of a fraudulent intent, a question of law is presented for the judgment of the court. (*Morris agt. Talcott*, 96 N. Y., 100.)
32. Facts not found by a referee, and as to which no finding was requested, may not be considered for the purpose of reversing a judgment. (*Burnap agt. Nat. Bank of Potsdam*, 96 N. Y., 125.)
33. The provision of the act of 1863 (*chap. 226, Laws of 1863*), providing "that the appellate court shall have power upon any writ of error," upon reversal of judgment, where it appears that the conviction was legal and regular, "to remit the record to the court in which such conviction was had to pass such sentence as the appellate court shall direct," was not repealed by the Code of Criminal Procedure, so far as actions then pending are concerned, but is continued in force as a rule of procedure in respect to such actions (*sec. 962*), and is applicable, although the case be brought up by appeal as authorized by said Code, instead of by writ of error. (*People agt. Berk*, 96 N. Y., 188.)
34. As to whether a case so pending should be brought up for review by appeal or by writ of error, *quære*. (*Id.*)
35. The provision requiring the court to which the record is remitted to pass such sentence as the "appellate court shall direct," does not require the appellate court to fix the time of imprisonment or to exercise a discretion in respect to punishment given to the court in which the conviction was had.

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Sentence is directed within the meaning of the provision when the appellate court points out the law providing for the punishment and directs the court below to sentence thereunder. (*Id.*)

36. In the absence of objections to the sufficiency of a complaint, it is the duty of the trial court to give the plaintiff the benefit of any cause of action established by the evidence; and upon appeal this court will consider the cause of action disclosed by the evidence, without regard to any objections to the sufficiency of the pleadings, which were not made in the court below. (*Knapp* agt. *Simon*, 96 N. Y., 294.)

37. An order directing a further return to a writ of *habeas corpus* or *certiorari*, issued under the Code of Civil Procedure (*sec.* 2015 *et seq.*), to inquire into the cause of detention of a person, is not appealable (*sec.* 2058); and the general term of the supreme court has no authority to review it. (*In re Larson*, 96 N. Y., 381.)

38. Where, upon appeal from order of the general term reversing such an order, the appeal papers did not show that the objection to its jurisdiction was raised before that court: *Held*, that it could be raised here. (*Id.*)

39. An appeal to the general term of the court of common pleas, in and for the city and county of New York, from an order of the general term of the marine court of that city, granting a new trial, is allowed only upon condition that the appellant consent to a final judgment against him if the order is affirmed (*sec.* 9, *chap.* 545, *Laws of 1874*). Without such a consent, therefore, there can be no appeal and no final judgment entered upon it. (*Wilmors* agt. *Flack*, 96 N. Y., 512.)

40. Where, upon appeal to the general term from a judgment in favor

of plaintiffs, in an action tried by the court, the record does not contain the evidence, but the appeal is heard and determined solely upon the findings of fact and law, in order to succeed it is incumbent upon the appellant to show that the trial court could not, in any view of the facts found, properly order a judgment for plaintiff. (*Agricultural Ins. Co.* agt. *Barnard*, 96 N. Y., 525.)

41. In reviewing the determination of a trial court on questions of fact, when the evidence is conflicting, an appellate court is not warranted in reversing, upon the sole ground that, in its opinion, the trial court should have reached a different conclusion; to justify a reversal, it must appear that the proofs so clearly preponderated in favor of a contrary conclusion that it can be said with a reasonable degree of certainty that the trial court erred in its conclusions. (*Baird* agt. *Mayor, &c.*, 96 N. Y., 567.)

42. In an action to recover the contract-price for certain water-meters furnished by N., plaintiff's assignor, to defendant, under a contract with the commissioner of public works, the answer set up as a defense, not as a counter-claim, alleged defects and imperfections in the meters furnished. No damages were claimed or found on the trial: *Held*, that the question as to whether a counter-claim might not have been established was not available on appeal; and that an erroneous order of the general term, reversing a judgment in favor of plaintiff and granting a new trial, might not be affirmed for the purpose of enabling defendant to present such a counter-claim. (*Id.*)

43. When the record on appeal, in a case tried by the court, contained a paper headed "requests to find," also another paper containing exceptions to assumed refusal of the

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- requests, but there was no "note upon the margin" of the requests as required by the Code of Civil Procedure (sec. 1023), or elsewhere, showing how, if at all, the propositions were disposed of, or that the attention of the court had been called to them: *Held*, that said assumed requests could not be considered in determining the appeal. (*Harris* agt. *Van Wurt*, 96 *N. Y.*, 642.)
44. As to whether the provision of the Code of Civil Procedure (sec. 2588), providing that where the reversal or modification "by the appellate court" of a surrogate's decree admitting a will to probate, is founded upon a question of fact, such court must make an order directing a trial of the material questions of fact by a jury, applies to appeals to this court in probate cases, *quæra*. (*In re Will of Smith*, 96 *N. Y.*, 661.)
45. The provision has no application where the reversal is for errors of law only. (*Id.*)
46. Where, in answer to appeal from surrogate's decree, the respondent alleges errors in portions of the decree not appealed from, the general term has jurisdiction to review and to reverse those portions; a separate appeal is not necessary (*Code of Civil Procedure*, sec. 2587). (*See Freeman* agt. *Coit*, 96 *N. Y.*, 63.)
47. When error in overruling challenges to jurors requires a reversal. (*See People* agt. *Casey*, 96 *N. Y.*, 115.)
48. An order denying motion for a new trial on the ground of surprise and newly discovered evidence not reviewable here. (*Smith* agt. *Platt* [Mem.], 96 *N. Y.*, 635.)
49. Where an accounting between partners has been had upon an erroneous theory, the remedy here is to reverse judgment and order the accounting on a correct theory, this court may not take the account. (*Id.*)
50. An order denying a motion to quash a common-law *certiorari*, issued in a case not reviewable by *certiorari*, is appealable to this court. (*People ex rel. Second Ave. R. R. Co.* agt. *Ed. Com. Dept. Pub. Parks*, 97 *N. Y.*, 37.)
51. Where, upon return to a writ of *certiorari* to review a decision of the assessors of the city of Buffalo, upon a claim for damages by reason of the alteration of the grade of a street, which decision certified that no damages had been sustained, it was conceded that damages were in fact sustained, but the assessors arrived at their conclusion by offsetting benefits: *Held*, that a question of law was presented and the decision of the assessors thereon was open to review. (*Code of Civil Procedure*, sec. 2140); also, that the decision was erroneous. (*People ex rel. Brisbane* agt. *Zell*, 97 *N. Y.*, 203.)
52. Where a judgment in an action tried by the court or a referee is reversed and new trial granted at general term, and the order fails to show that the reversal was upon the facts, this court must assume that it was granted upon questions of law only. (*Rider Life Raft Co.* agt. *Roach*, 97 *N. Y.*, 378.)
53. It is the duty of the party succeeding at general term if its determination was influenced by questions of fact, to see that the order so states, or to have it corrected on motion; if he fails so to do, those questions may not be considered here. (*Id.*)
54. An order of a county court in proceedings under the Drainage Act (chap. 868, *Laws of 1869*, amended by chap. 303, *Laws of 1871*), as amended in 1881 (chap. 608, *Laws of 1881*), determining that a new or second assessment

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- is necessary and directing the same, is final upon matters of fact, but is appealable to the general term of the supreme court, and to this court upon any question of law arising upon the whole act, or upon any proceeding necessarily affecting such order. (*In re Swan*, 97 N. Y., 492.)
55. An order of general term reversing, with costs, an order denying a motion to punish a defendant for alleged contempt in violating an injunction, and remitting the matter to the court below to proceed against defendant, is not reviewable here, even so far as it awards costs. (*Crosby* agt. *Stephan*, 97 N. Y., 606.)
56. Where costs are awarded by an order, and depend upon the conclusion reached upon the merits of the motion, and this court has no jurisdiction to review the subject-matter of the order, it may not review the question as to the propriety of the award of costs. (*Id.*)
57. The rule that questions of costs in legal actions and proceedings are reviewable here whenever legitimately before the court, unless the allowance was discretionary, does not apply, when, in order to determine whether costs were properly allowed or not, it is necessary to review matters over which the court has no jurisdiction. (*Id.*)
58. In any event to entitle a party to review the portion of an order awarding costs, the notice of appeal should state specifically that it is from such part of the order. (*Id.*)
59. A general term has no power to compel a party to accept notice of appeal after the time for appealing has expired, as this would be in effect to allow an appeal, which courts are expressly prohibited from doing, after the expiration of the time fixed by law for such appeal (*Code Civil Procedure*, sec. 784). (*Clapp* agt. *Hawley*, 97 N. Y., 610.)
60. An order of general term, requiring a party to accept notice of appeal after expiration of the time limited, is appealable to this court. (*Id.*)
61. Where the general term reversed an order amending a complaint so as to demand judgment for a larger amount on the sole ground that the amendment was beyond the power of the court: *Held*, that this court had power to review; and the case was remitted to the general term to exercise its discretion in reviewing the order. (*Reed* agt. *Mayor, etc.*, 97 N. Y., 620.)
62. In an equity action, certain issues of fact were tried by a jury, and on the trial improper evidence was received, under objection and exception. The action was tried by a judge other than the one who presided on the jury trial. A case containing the evidence given on that trial was received in evidence without objection: *Held*, that the exceptions taken on the jury trial were not available on appeal from the judgment; that by omitting to raise the objection to the improper evidence or calling the attention of the court thereto, the objections and exceptions must be deemed to have been waived. (*Arnold* agt. *Parmelee*, 97 N. Y., 652.)
63. Where plaintiff was unsuccessful on appeal in an equity action, and was properly chargeable with costs, and some of the defendants also failed on appeal as against a co-defendant, ordered that plaintiff pay costs directly to successful defendant. (*See M. and T. Nat. Bank* agt. *Mayor, etc.*, 97 N. Y., 355.)
64. Where exceptions insufficient to raise question an appeal. (*See*

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Hepburn agt. *Montgomery* [Mem.], 97 N. Y., 617.)

65. On trial at circuit the court dismissed complaint. Subsequently, at same circuit on motion made with defendant's consent, and upon the waiving of all questions as to regularity, the trial court vacated the order and granted a new trial. The general term dismissed appeal from the order. On appeal to this court: *Held*, that the order of the circuit court appealed from was not void for want of jurisdiction, and the consent was a full answer to all questions as to regularity; also, that the general term order dismissing the appeal was proper. (See *Emmerich* agt. *Heffernan* [Mem.], 97 N. Y., 619.)

66. A party accepting costs allowed by judgment precludes himself from appealing therefrom. (See *Carl* agt. *Oakley* [Mem.], 97 N. Y., 638.)

67. Order vacating attachment on ground of insufficiency of affidavits upon which it was granted, not reviewable here. (See *Bate* agt. *McDowell* [Mem.], 97 N. Y., 646.)

ARBITRATION.

1. Although a party may waive the right to be heard and to produce witnesses before arbitrators, such right will not be deemed to have been waived unless the waiver is clearly demonstrated. (*Matter of Martin*, ante, 28.)
2. Even if a party waives his right to appear before the two original arbitrators, he is still entitled to appear and be heard before the umpire, and an award by the latter where a party has had no opportunity to appear before him is void. (*Id.*)
3. On a motion to vacate and set aside an award where it appeared

that the umpire was not notified until the 28th of April, 1884, that he would be called upon to act. On the 29th of April, 1884, he accepted the position, and on the 30th of April, 1884, he made his award. The parties were not called before the umpire, nor were they heard before him and the arbitrators. He took the statements which had been laid before the arbitrators and verbally settled the differences between such arbitrators, and gave his decision as umpire and made his award, which award was subsequently acquiesced in and agreed to by the arbitrators:

Held, that the award should be vacated and set aside. (*Id.*)

ATTORNEYS.

1. The provisions of the Revised Statutes (2 R. S., 287, sec. 68), making an attorney "who shall be guilty of any deceit or collusion, * * * with intent to deceive the court or any party," liable for treble damages, has reference to a suit pending, and does not include a transaction between an attorney and his client before proceedings have been commenced or an action brought. (*Looff* agt. *Lawton*, 97 N. Y., 478.)

ARREST.

1. It is not necessary, as a condition to the granting of an order of arrest, pursuant to subdivision 4 of section 549 of the Code of Civil Procedure, that a complaint should be submitted to the court or justice granting such order, nor that the contents of the complaint should be stated in an affidavit, nor that any complaint should be in existence at the time such order is granted. (*Hall* agt. *Conger*, ante, 88.)
2. An order of arrest may be granted under subdivision 4 of section 549,

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upon an affidavit setting forth facts, showing that a cause of action exists against the defendant under that subdivision, but the order must be vacated immediately upon the filing or service of the complaint, if a cause of action under the same subdivision is not therein set forth. (*Id.*)

8. The fact that defendant said that he would not pay the plaintiff, and that he could not get the money, furnishes no ground of arrest, even when coupled with the admitted assertion that he was going to Europe. (*Stroub* agt. *Henly*, ante, 400.)

4. Where the only evidence submitted is, that defendant said that he would not pay the plaintiff, that he was going to Europe, and the opinion of plaintiff that he was about to take away all his money and property; a valid ground of arrest is not established. (*Id.*)

See UNDERTAKING.

Staab agt. *Shupe et al.*, ante 4.

5. Undertaking upon — the plaintiff may sign it with the sureties — Code of Civil Procedure, sec. 559. (*See O'Shea* agt. *Kohn*, 53 *Hun*, 114.)

6. While this court will not review an order denying a motion to vacate an order of arrest, obtained upon the theory of a fraudulent contraction of debt, when the facts and circumstances proved, or the legitimate inferences therefrom, tend to establish the existence of a fraudulent intent, yet when there is no evidence legitimately tending to establish such a conclusion, and the natural inferences to be drawn from the facts proved do not necessarily lead to the presumption of a fraudulent intent, a question of law is presented for the judgment of the court. (*Morris* agt. *Talcott*, 96 *N. Y.*, 100.)

ASSESSMENTS.

See RAILROADS.

In re Cedar Park, ante, 257.

ASSIGNEE.

1. Where an official assignee of a debtor sues upon a cause of action arising "before the assignment," he may be required by the defendant as of right to give security for costs. (*Welch* agt. *Gaffney*, ante, 146.)

ASSIGNMENT.

1. Where an assignment was in substance as follows: "We, D., J., B. & E., all of Utica, comprising the firm of D., J., B. & Co., doing business as manufacturers in Utica, for one dollar to us paid, hereby assign to P. all of our personal and real property not exempt from execution, in trust for our creditors. We direct said trustee to take possession of all our estate and convert the same into cash for our creditors. We direct him out of the first to pay expenses of administration; and, whereas, divers persons have each indorsed notes and drafts for our use and benefit and for the benefit and accommodation of our firm, and we have given a mortgage on our stock and goods to P. the first indorser on most of said paper which has been used by us and is now held by parties to us unknown; we, therefore, direct said trustee to pay all of said paper and bear said indorsers harmless from liability on account of indorsements for our said firm. We direct that said assignee next pay all of our debts in full, reserving to ourselves all moneys that remain in his hands after payment of all our debts:

Held, that the assignment did not cover individual property nor provide for the payment of individual debts.

Held, further, that a contestant

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not being a firm creditor, but only an individual creditor of two of the assignors, has no standing in court upon an accounting of the assignee. (*Matter of David T. Davis et al.*, ante, 79.)

2. Where assignors assign jointly, or as copartners only, neither the assignee nor the courts can reach the individual property of any one of them in any proceeding under the assignment, or in any attempt to enforce it. (*Id.*)

ATTACHMENT.

1. To sustain an application of one claiming a lien as a junior attaching creditor to vacate a prior attachment, it is necessary for him to establish by legal evidence a subsequent valid levy under his attachment upon the same property covered by the prior attachment. (*Knudson agt. Matruska & Craig Furniture Co.*, ante, 152.)

2. Where, upon such an application, an affidavit is made by the managing clerk in the office of the attorney for the junior attaching creditor, in which affidavit such clerk, referring to the levying of the prior attachment, states that thereafter, on the 2d day of December, 1884, an attachment was issued in the second action against the property of said defendant to said sheriff, through his deputy, levied on the 3d day of December, 1884, upon the same property theretofore levied upon by him under the attachment in the first action, "as I am informed and verily believe." He then goes on to state that the facts herein recited were obtained from Thomas Brady, the deputy sheriff having charge of and who made said levies, and that the reason why an affidavit is not produced from said deputy is that while he admitted that the statements regarding the facts recited herein are true he is unwilling to make the affidavit:

Held, that this affidavit is insufficient to show that the junior attaching creditor has a good and valid lien upon the property attached, enabling him to attack and vacate the attachment issued in the former suit. (*Id.*)

3. Where an attachment was granted upon an allegation that defendants were indebted to plaintiffs for the price of goods sold and delivered, and that defendants had assigned, disposed of and secreted their property, with intent to defraud their creditors, and defendants controverted these grounds by averring that the goods had been sold upon a credit which had not expired, it was competent for plaintiffs to establish by answering affidavits the existence of the indebtedness by showing that the purchase-price had become due because the debt had been fraudulently contracted. (*Victor agt. Henlien*, ante, 159.)
4. Where it appeared that defendants, in June, represented to a mercantile agency that they had a surplus of over \$101,000 over their liabilities of \$65,000, on which statement, which had been communicated to plaintiffs, they relied in the sale and delivery of the goods, and defendants, in November following, made an assignment for the benefit of creditors, whereby it appeared they were then \$75,000 in debt over and above their assets, and they could not by their books account for the difference:
Held, that defendants must be presumed to have known that their statement to the agency was untruthful in the extreme, and that a credit obtained in that manner was fraudulent and not binding upon the creditors, who were entitled to commence their action at once. (*Id.*)
5. Where it appeared that, before the general assignment by defendants, they had appropriated—notwithstanding their indebtedness

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of \$75,000 beyond their assets—a large sum for the payment of individual debts and for the support of themselves and their families, unless by means of their assignment they could secure an adjustment of their debts with their creditors at forty cents on the dollar:

Held, that this was an unlawful appropriation of the firm's assets; and though defendants may not have thereby positively intended to defraud their creditors, plaintiffs were entitled to an attachment against their property for the reason that they had disposed of a portion of it at least, with the intent to defraud their creditors. (*Id.*)

6. Plaintiffs had a right to disaffirm the last of a series of sales of goods when they discovered that the goods had been fraudulently obtained, without affecting their right to maintain an action for the recovery of the debt owing for the goods previously sold. (*Id.*)

7. Upon a motion, founded on the papers upon which an attachment was granted, to vacate such attachment, the justice presiding permitted an affidavit made several days after the attachment to be filed *nunc pro tunc*, as of the prior date, and to be read in support of the process:

Held, that this ruling was erroneous, the paper not being one in any way connected with the granting of the attachment, and, therefore, was prohibited by section 688 of the Code from consideration when the motion to vacate was made. (*Sutherland agt. Brodner, ante, 188.*)

8. An averment in an affidavit for an attachment made by a plaintiff, "that a cause of action exists in favor of plaintiffs against said defendants for which said action is commenced, and that the amount of plaintiff's claim in said action is \$283.20, and interest from the

15th day of April, 1888, over and above all counter-claims and set-offs known to deponent," is a compliance with the requirement of section 686 of the Code of Civil Procedure, that plaintiff must show by affidavit that he is entitled to recover a sum stated therein, *over and above all counter-claims known to him*, and is sufficient to give the judge jurisdiction to grant the warrant. (*Barton agt. Saalfeld, ante, 276.*)

9. The presumption is that a man resides where his family and house are. (*McKinlay agt. Fowler, ante, 282.*)

10. One having his domicile in this state may, by absence therefrom in another state, become a non-resident within section 686 of the Code, relating to attachments. (*Id.*)

11. A firm as such cannot be said to have a residence. It is the individual members who have residences (*Reversing S. C., 67 How., 388.*) (*Id.*)

12. The plaintiff's agent, after setting forth the cause of action, states that "there is now due to said plaintiff from defendant the sum of \$447.95 over and above all offsets and counter-claims known to deponent or to said plaintiff:

Held, that the clause "known to plaintiff," as used in section 686 of the Code of Civil Procedure, is not a jurisdictional prerequisite for the issuing of a warrant of attachment, but must be held to be merely limiting in its character and analogous to the statutes of Michigan, Colorado and other states, which provide that the plaintiff shall set forth the "amount of the indebtedness as near as may be over all counter-claims." (*Mallory agt. Allen, ante, 816.*)

13. The intent of the legislature in the enactment of section 686 considered. (*Id.*)

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14. The case of *Oribben* agt. *Schellen-ger* (80 Hun, 248) questioned. (*Id.*)
15. The affidavit of O., on which the attachment was granted, alleges that "he is the agent and one of the salesmen for the plaintiffs herein; that at certain specified dates the plaintiffs sold and delivered to the defendant at his special instance, goods of a certain value, no part of which has been paid, although deponent has demanded payment of the defendant, and said sum is due to the plaintiffs herein from the defendant, over and above all claims and offsets:
Held, that this affidavit fulfills the requirements of section 686 of the Code of Civil Procedure. An agent and salesman is presumed to be familiar with the every day occurrences and general routine of his employer's business affairs, and to have better, or at least as good, knowledge of the condition of things between the plaintiffs and the defendant as the plaintiff himself. It is not necessary for him to account for his knowledge. (*Bates* agt. *Pimstein*, ante, 835.)
16. For the same reason it is not necessary for him to account for his making the affidavit in consequence of his employer's absence from the state. (*Id.*)
17. Nor is the affidavit insufficient because of the omission of the clause "known to them." It is made not only by an agent, but by a salesman of the plaintiffs, and the cause of action arises out of a sale of goods; it was made on knowledge, and the well known rule of law applies that "the law will not infer that matters positively sworn to were not within the personal knowledge of the affiant." (*Id.*)
18. The proceedings in a district court incident to the application for the granting and the execution of the warrant of attachment, and the duties of the justice and the clerk with respect to those proceedings, are now the same as are prescribed by the district court act; but if we wish to ascertain when and for what causes an attachment may be granted, for what reason it may be dissolved, and what effect upon the action will be produced by the vacating of the attachment, we must look to article 4 of the Code of Civil Procedure. (*Rosenthal* agt. *Gross*, ante, 447.)
19. By section 2917 of the Code of Civil Procedure the attachment is now only a provisional remedy, and an error of the justice in regard to such a remedy will not cause the reversal of the judgment if the action were properly decided upon its merits. (*Id.*)
20. At present there is no remedy for a party aggrieved if a district court errs in upholding or in vacating a provisional remedy. The decision of the justice cannot be reviewed on appeal (*This is adverse to Lang* agt. *Marks*, 65 How., 127). (*Id.*)
21. The provisions of section 3210 and of 3211 of the Code of Civil Procedure in relation to provisional remedies in the district civil courts, are in conflict. (*Id.*)
See SHERIFF.
Bowes agt. *Wilkins*, ante, 21.
22. The affidavit must show a sum due over all counter-claims known to the plaintiff — Code of Civil Procedure, sec. 686, sub. 1 — when a reference to other papers on file is unavailing in an affidavit. (*Smith* agt. *Arnold*, 33 Hun, 434.)
23. When issued because of fraudulent statements made by a vendee to induce a sale — statements of the vendee made to a mercantile agency — when the retention of money for family expenses prior to the making of a general assignment will not authorize the issu-

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- ing of an attachment. (*See Victor agt. Henlein*, 33 Hun, 549.)
24. Fees of sheriff on attaching property—when the judge cannot compel the party liable therefor to pay them—Code of Civil Procedure, sec. 8807, sub. 2. (*Hall agt. U. S. Reflector Co.*, 34 Hun, 467.)
25. When the sheriff ceases to hold the property for the attaching creditor. (*Id.*)
26. Election of remedies. (*Id.*)
27. On a motion to vacate, upon the original papers, no affidavits sustaining it can be read—Code of Civil Procedure, sec. 688. (*Sutherland agt. Bradner*, 34 Hun, 519.)
28. Attaching creditor—action by him to collect the demand attached—Code of Civil Procedure, secs. 677, 678 and 679—he may impeach the good faith of an assignment of the demand. (*Throop Grain Cleaner Co. agt. Smith*, 34 Hun, 91.)
29. Facts authorizing. (*Ross agt. Wigg*, 34 Hun, 192.)
30. A debt is due at once, if the goods be sold on a credit procured through fraudulent representations—it is fraudulent for the members of an insolvent firm to pay individual creditors out of the firm assets, or to reserve moneys for the support of their families, when making a general assignment. (*See Victor agt. Henlein*, 34 Hun, 563.)
31. A levy by virtue of an attachment upon a promissory note creates no lien thereon, unless at the time the attachment debtor has a legal title thereto. (*Anthony agt. Wood*, 96 N. Y., 180.)
32. Where, therefore, before an attempted levy, the debtor has parted with the legal title, although with intent to defraud his creditors, as there remains in him only an equity for their benefit, this cannot be reached by the attachment, and the sheriff may not assail the transfer as fraudulent. (*Id.*)
33. The provision of the Code of Civil Procedure (sec. 640), providing for a levy by virtue of an attachment upon "a promissory note or other instrument for the payment of money" by "taking the same into the sheriff's actual possession," merely changes the mode of making the levy; it in no respect alters the inherent quality of such instruments as choses in action. (*Id.*)
34. Under said provision a levy can only be made by obtaining the actual custody of the instrument. (*Id.*)

ATTORNEY AND CLIENT.

1. It is the duty of an attorney, as an officer of the court, to furnish all information required by the court, in order to carry out its process without reserve. (*Bauer agt. Bets*, ante, 344.)
 2. Where an attorney, in answer to an order directing him to state the whereabouts of the plaintiff, so that an injunction could be served upon him, made a statement of the residence of the plaintiff which was misleading:
Held, that the attorney was properly charged with all the expenses of the reference to ascertain the plaintiff's whereabouts, on the ground of misconduct. (*Id.*)
- See Costa.*
Krom agt. Kureheedt, ante, 88.
3. Attorney—when he loses his right to enforce a claim of his own, by acting as attorney in an action for the enforcement of an inconsistent claim made by his

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client. (*Parsons* agt. *Tower*, 38 *Hun*, 569.)

4. Board of education of a Union free school district — is a corporation — it may employ an attorney to defend an action — it may select one of its own members to act as its attorney — 1864, chap. 555, tit. 9. (*See Gould* agt. *Board of Education*, 84 *Hun*, 16.)

BAIL.

1. The Code as it exists when the application to exonerate bail is made, governs, and not the Code as it existed when the undertaking was entered into. (*Walsh* agt. *Schule*, ante, 506.)
2. The right of the bail to be exonerated upon the death of the defendant is limited to cases where such death occurs before the expiration of the time to answer in the action brought against the bail. (*Affirming S. C.*, 67 *How.*, 173.) (*Id.*)

BILL OF PARTICULARS.

1. A bill of particulars should not be allowed of the damages claimed in a suit arising from injuries negligently inflicted. (*Muller* agt. *Bush and Denslow Mfg. Company*, ante, 50.)
2. Where the plaintiff's house was injured by an alleged negligent explosion in defendant's oil works: *Held*, that a bill of particulars of the plaintiff's demand was properly denied. (*Id.*)
3. A copy of the evidence before the grand jury upon which indictments were found should be furnished the accused when necessity therefor is shown to enable him to prepare for trial, and the matter is one resting in the discretion of the court. (*People* agt. *Bellows*, ante, 149.)

4. Where the statements in an indictment are sufficiently definite to advise defendant of the charge against him he is not entitled to any further particulars. (*Id.*)

5. Where the counts for an offense such as grand larceny are so general and embrace so many subjects of larceny that they do not advise the defendant with sufficient distinctness of the charge in each against him, the sums stolen, upon the proof of which the people rely, should be particularly stated so that defendant may be advised of the precise charges under the counts relating to the crime, and thus be enabled to prepare to meet them. (*Id.*)

6. Where defendant is not entitled to a bill of particulars as a matter of right, but, on a demand by defendant, plaintiffs serve a defective one, an order that plaintiffs furnish a further bill is a matter of discretion, and will not be interfered with on appeal. (*Longden* agt. *Brown*, ante, 538.)

BOARD OF ESTIMATE AND APPORTIONMENT.

1. It is within the powers of the board of estimate and apportionment to transfer from an appropriation made to a certain department for one purpose, to another purpose in the same department. (*Bird* agt. *The Mayor, &c., of the City of New York*, ante, 139.)
2. Where any number of persons are appointed to act judicially in a public matter, *all must confer, but a majority may decide.* (*Id.*)
3. Therefore, where an act is authorized to be done by the board of estimate and apportionment, the ordinary rule of law applies, and a majority of the whole board, at a meeting of all the members thereof, can legally decide upon

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the propriety of doing such act. (*Id.*)

CASE.

1. When record on appeal in a case tried by the court contained a paper headed "requests to find," also another paper containing exceptions to assumed refusal of the requests, but there was no "note upon the margin" of the requests as required by the Code of Civil Procedure (sec. 1028), or elsewhere, showing how, if at all, the propositions were disposed of, or that the attention of the court had been called to them:

Held, that said assumed requests could not be considered in determining the appeal. (*Harris* agt. *Van Wart*, 96 N. Y., 642.)

CERTIORARI.

1. Where a child four years of age was committed by a police magistrate for violation of subdivision 4 of section 291 of the Penal Code, a judge cannot by means of a writ of *certiorari* directed to the magistrate, review the hearing had before such magistrate, and determine whether he had or had not acted upon sufficient evidence in making the order of commitment. (*The People ex rel. Eck* agt. *The American Female Guardian Society*, ante, 187.)
2. Abandonment of a wife by her husband — the decision of a police justice may be reviewed upon a *certiorari* — the justice does not act as a court of special sessions. (*See People ex rel. Scherer* agt. *Walsh*, 83 Hun, 345.)
3. Audits of a board of supervisors cannot be reviewed after the roll has been signed and the tax warrants delivered. (*People ex rel. Gale* agt. *Supervisors*, 84 Hun, 266.)
4. An order directing a further return to a writ of *habeas corpus* or

certiorari, issued under the Code of Civil Procedure (secs. 2015, et seq.) to inquire into the cause of detention of a person, is not appealable (sec. 2058); and the general term of the supreme court has no authority to review it. (*In re Larson*, 96 N. Y., 881.)

5. An order denying a motion to quash a common-law *certiorari*, issued in a case not reviewable by *certiorari*, is appealable to this court. (*People ex rel. agt. Bd. Comrs. Pub. Parks*, 97 N. Y., 87.)
6. Such a writ lies only to inferior tribunals or officers exercising judicial powers, to correct errors of law affecting materially the rights of parties. (*Id.*)
7. The fact that a public agent exercises judgment and discretion in the performance of his duties does not make his action or powers judicial in their character. (*Id.*)
8. A writ of *certiorari* to review action of a board, a department of a city government, should be directed to individual members. (*See People ex rel. agt. Board of Comrs.*, 97 N. Y., 87.)

CODE OF CIVIL PROCEDURE.

1. Section 52—Contempt — an order requiring a person to show cause why he should not be punished, made by a county judge whose term expires before the return day, may be heard by his successor — Code of Civil Procedure, secs. 2457, 2462. (*See Gammon* agt. *Berry*, 84 Hun, 188.)
2. Section 112—Support of persons in jail in civil proceedings — contract by the county for their support — 1875, chap. 251 — 1877, chap. 417. (*See People* agt. *Bowse*, 84 Hun, 528.)
3. Section 147—Jail — power of the board of supervisors to establish

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- one — power of the board to establish and alter jail liberties — 1875, chap. 483, sec. 1; sub. 1-18. (*See Boach* agt. *Odell*, 33 *Hun*, 820.)
1. Section 170—The stay under this section of the new Code, which stays proceedings against the sheriff until he can collect from the bondsman of an escaped judgment debtor, is discretionary and the court will not grant it where the sheriff has not proceeded with diligence. (*Potts* agt. *Davidson*, *ante*, 215.)
 5. Sections 190, 191, 8194, 8195, 1800 — Where an appeal is allowed by the common pleas from a judgment of the city court, the notice of appeal should specify that the appeal is from the order or judgment of the common pleas, as there can be no appeal to the court of appeals from the city court. (*Ansonia Brass and Copper Company* agt. *Connor et al.*, *ante*, 499.)
 6. Sections 190, 191 — Appeal from an order of the general term modifying a peremptory writ of *mandamus* — Code of Civil Procedure, secs. 1856, 2070. (*See People ex. rel. Collins* agt. *Spicer*, 34 *Hun*, 584.)
 7. Section 191 — Where the action is not founded upon contract the sum for which the complaint demands judgment is deemed to be the amount of the "matter in controversy" within the meaning of this section of the Code of Civil Procedure, which prohibits an appeal when the matter in controversy is less than \$500. (*Zoeller* agt. *Riley*, *ante*, 525.)
 8. Section 191, sub. 3 — Power to allow an appeal under — by what general term it must be exercised. (*See De Freest* agt. *City of Troy*, 34 *Hun*, 684.)
 9. Section 319 — Under this section of the Code of Civil Procedure an application for the removal of a cause from the New York city court into the supreme court, and to change the place of trial, may be made at any time after the joinder of an issue of fact, and before the trial thereof, and no demand is necessary for a change of place of trial prior to the notice of application. Whether the order should be granted or not is purely a matter of discretion. (*Granger* agt. *Sheble*, *ante*, 180.)
 10. Section 319 — Removal of cause from the marine court to the supreme court, in order to change the venue. (*See Granger* agt. *Sheble*, 34 *Hun*, 241.)
 11. Sections 340, 341 — County court — jurisdiction of, over domestic corporations. (*See Heenan* agt. *N. Y. W. S. and B. R. Co.*, 34 *Hun*, 602.)
 12. Section 341 — Under this section of the Code of Civil Procedure the county court has no jurisdiction in an action against a domestic railroad corporation, unless its principal office is located within the county, or the summons is served in the county in which the action is brought and in which some of its business is transacted. (*Heenan* agt. *New York, West Shore and Buffalo Railway Co.*, *ante*, 52.)
 13. Section 383 — Statute of limitations — an action by a husband to recover damages for injury sustained by his wife is governed by the six years' limitation. (*See Groth* agt. *Washburn*, 34 *Hun*, 509.)
 14. Section 394 — Statute of limitations — an action against the directors of a banking association for negligence must be brought within three years — Code of Civil Procedure, secs. 394, 414 — the commencement of the action by one stockholder does not stop the running of the statute against others who subsequently join as plaintiffs. (*See Brinkerhoff* agt. *Eastwick*, 34 *Hun*, 352.)

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15. Section 401—The statute of limitations will not run in favor of a debtor who comes into the state under an assumed name and continues therein under such assumed name, with the intent to conceal himself from his creditors until the creditor acquires knowledge of the debtor's presence within the state. (*Engel agt. Fischer, ante, 147.*)

16. Sections 450, 1206—It was the intention of the legislature, evinced by these sections of the Code of Civil Procedure, that proceedings to enforce a liability of a married woman shall be the same as if she was unmarried, and that all distinctions between a *feme sole* and a *feme covert* as to the form of the judgment to be entered is abolished.

The judgment in an action against a married woman, by section 1206 of the Code, is to be rendered and enforced as if she was single.

In a suit against a married woman upon her promissory note, in which she charged her separate estate with the payment thereof, the plaintiff is entitled to a simple money judgment only. (*Brainard agt. White, ante, 156.*)

17. Section 450—Slander—in an action for slanderous words spoken by a wife, the husband must be made a defendant. (*See Fitzgerald agt. Quann, 38 Hun, 652.*)

18. Section 456—Under the provisions of this section of the Code of Civil Procedure, in actions where the complaint alleges the defendants to be severally liable, part may be proceeded against and the rest left out. An action under chapter 510 of the Laws of 1875, with an allegation in the complaint demanding a several judgment, is an action where the parties are alleged to be severally liable. (*Geisenheimer agt. Dodge, ante, 265.*)

19. Section 456—Actions against

trustees to recover corporate debts as penalty for failure to file annual reports, pursuant to chapter 510 of the Laws of 1875, are not excluded by nor included in this section of the Code of Civil Procedure. In such actions one, any number, or all of the trustees may be made parties, and it is no defense that one trustee has not been joined, affirming *Strong agt. Sprout* (4 *Daly, 326*), reversed on another point (58 *N. Y., 497*), explaining *Quigley agt. Waller* (32 *N. Y. Supr. Ct., 175*). (*Halstead agt. Dodge, ante, 170.*)

20. Section 472—Power of the courts to allow amendments to be made *nunc pro tunc*—Code of Civil Procedure, sec. 723. (*See Tobin agt. Cary, 34 Hun, 431.*)

21. Sections 484, 1757—The two causes of action, adultery and cruelty, cannot be united in the same complaint. (*Buchholz agt. Buchholz, ante, 46.*)

22. Section 484—Plaintiff's complaint contained two causes of action, one to recover damages alleged to have been caused by an embankment erected by defendant upon its land, which turned the waters of a stream and caused them to flow over plaintiff's premises; the other to recover damages for an alleged breach of duty on the part of defendant in neglecting and refusing to erect and maintain a farm crossing. On demurrer: *Held*, that the two causes of action were improperly united, as the first was "for injuries to real property," while the second arose "upon contract;" it being for the breach of an implied contract to perform a statutory duty; that the fact that such contract affects real estate does not change the nature of the obligation so as to make the cause of action one relating to real property within the meaning of this section of the Code of Civil Procedure. (*Thomas agt.*

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Utica and Black River R. R. Co.,
97 N. Y., 245.)

23. Sections 486, 493, 507 — In an action against a railway corporation an allegation in the complaint that a part of the line of the road is run and operated within the county is sufficient as to residence.

Except where a demurrer may be interposed, any jurisdictional question may be raised by the answer and a general appearance with such an answer is no waiver of the objection. (*Heenan* agt. *N. Y. W. S. and Buffalo Railway Company*, ante, 53.)

24. Section 490 — Demurrer — upon the ground of a misjoinder of parties plaintiff — the objection must be specifically stated. (*See Berney* agt. *Drexel*, 33 Hun, 419.)

25. Section 500 — Pleading — a denial upon information and belief is bad. (*See Pratt Mfg. Co.* agt. *Jordan Iron and Chem. Co.*, 33 Hun, 544.)

26. Section 500 — A denial in an answer of "each and every allegation not hereinbefore admitted or denied" is bad. (*See Thierry* agt. *Crawford*, 33 Hun, 366.)

27. Section 503 — Statute of limitations — a counter-claim connected with or arising out of the subject-matter of the plaintiff's demand may be set up, after an action upon such counter-claim is barred by the statute — Code of Civil Procedure, sec. 508. (*See Herbert* agt. *Day*, 33 Hun, 461.)

28. Section 516 — In an action against an assessment insurance company, brought by a beneficiary to recover on a certificate of membership, where the defendant's answer alleged new matter, i. e., the making and non-payment of an assessment:

Held, that under this section of the Code of Civil Procedure, on motion of defendant's counsel, the court will require the plaintiff

to reply to the new matter set up in defendant's answer. (*Rogers* agt. *Mutual Reserve Fund Life Association*, ante, 194.)

29. Section 519 — The provisions of this section of the Code of Civil Procedure, requiring that the allegations of a pleading shall be literally construed, applies only to matters of form. It is still the duty of a party to present a clear and unequivocal statement of his cause of action or defense, and when a material statement is susceptible of two meanings, the one most unfavorable to the pleader must be taken.

While it is competent for the opposite party to move to make the pleading more definite and certain, he is not bound so to do; this burden may not be cast upon him by the fault of the pleader. (*Clark* agt. *Dillon et al.*, 97 N. Y., 870.)

30. Section 522 — Pleadings — a denial on information and belief is bad — Code of Civil Procedure, secs. 500, 522. (*See Pratt Mfg. Co.* agt. *Jordan Iron and Chem. Co.*, 33 Hun, 143.)

31. Section 523 — Answer — the verification thereof may be omitted in an action charging the defendant with keeping a bawdy-house. (*See Anderson* agt. *Doty*, 33 Hun, 238.)

32. Section 531 — Where defendant is not entitled to a bill of particulars as a matter of right, but, on a demand by defendant, plaintiffs serve a defective one, an order that plaintiffs furnish a further bill is a matter of discretion, and will not be interfered with on appeal. (*Longdon* agt. *Brown*, ante, 338.)

33. Section 531 — A bill of particulars should not be allowed of the damages claimed in a suit arising from injuries negligently inflicted.

Where the plaintiff's house was injured by an alleged negligent

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explosion in defendant's oil works:

Held, that a bill of particulars of the plaintiff's demand was properly denied. (*Muller* agt. *Bush and Denlow Manufacturing Company*, ante, 50.)

84. Section 534.—A plaintiff must state his interest or title, even in a suit upon an instrument for the payment of the money only, and such other extrinsic facts as are necessary to enable him to recover. A mortgage is not an instrument for the payment of money only. (*Rose* agt. *Meyer*, ante, 274.)

85. Section 538.—A denial in an answer on information and belief of each and every allegation in said complaint constituting the plaintiff's first alleged cause of action, is subject to a motion under this section of the Code of Civil Procedure to strike out as sham where it appears by uncontradicted proof that the defendant must have personal knowledge of the allegations he denies "on information."

If the allegation is untrue because the averments of the complaint are of personal transactions, the remedial provision of this section, permitting sham defenses to be stricken out on motion, should be applied and the decision in *Wayland* agt. *Tyson* (45 N. Y.) should not be extended to cover the case. (*Sherman* agt. *Boehm*, ante, 278.)

86. Section 549.—It is not necessary, as a condition to the granting of an order of arrest, pursuant to subdivision 4 of this section of the Code of Civil Procedure, that a complaint should be submitted to the court or justice granting such order, nor that the contents of the complaint should be stated in an affidavit, nor that any complaint should be in existence at the time such order is granted.

An order of arrest may be granted under subdivision 4 of this section, upon an affidavit setting

forth facts showing that a cause of action exists against the defendant under that subdivision, but the order must be vacated immediately upon the filing or service of the complaint, if a cause of action under the same subdivision is not therein set forth. (*Hall* agt. *Conger*, ante, 88.)

87. Sections 549, 559, 1487.—In an action against the sureties on an undertaking on arrest, where the nature of the cause of action and the right to the order of arrest are identical, commenced upon the vacating of the order of arrest, but before the termination of the action in which the order of arrest was granted:

Held, that the sureties were not liable on the undertaking until judgment was rendered in the action for defendant.

Also, *held*, that the undertaking carefully distinguishes between the cases where the right to arrest is identical with, and those where the right to arrest is extrinsic the cause of action; that in the one case the right to the order is determined by the fact that the plaintiff recovered judgment; in the other, the right to the order of arrest is determined upon motion, and if the vacated order is unreversed, it is a "final decision that the plaintiff was not entitled to the order of arrest" (*Schuyler* agt. *Englert*, 14 *Weekly Dig.*, 571, followed). (*Staab* agt. *Shupe et al.*, ante, 4.)

88. Section 550.—The fact that defendant said that he would not pay the plaintiff, and that he could not get the money, furnishes no ground of arrest, even when coupled with the admitted assertion that he was going to Europe.

Where the only evidence submitted is, that defendant said that he would not pay the plaintiff, that he was going to Europe, and the opinion of plaintiff that he was about to take away all his money and property, a valid ground of

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arrest is not established. (*Stroub* agt. *Henly*, ante, 400.)

39. Section 559—Undertaking upon arrest—when the plaintiff may sign it with the sureties. (*See O'Shea* agt. *Kohn*, 33 *Hun*, 114.)

40. Sections 600, 601—The Code as it exists when the application to exonerate bail is made, governs, and not the Code as it existed when the undertaking was entered into.

The right of the bail to be exonerated upon the death of the defendant is limited to cases where such death occurs before the expiration of the time to answer in the action brought against the bail. (*Affirming S. C.*, 67 *How.*, 178.) (*Walsh* agt. *Schultz*, ante, 506.)

41. Sections 604, 628, 1015—An injunction may be issued upon affidavit without a complaint. The state courts have no authority to issue an injunction to prevent an infringement of a patented invention. The courts of the United States are invested with exclusive jurisdiction over that subject, and it cannot be exercised by the courts of the states.

Where an injunction has been issued upon affidavits which show the controverted fact upon which the disposition of the litigation will probably be required to depend to be the title of certain patents, and it is deemed to be too uncertainly presented to be disposed of on affidavits, a reference is authorized by section 1015 of the Code of Civil Procedure, upon which the evidence may be orally produced before the referee affecting the rights of the parties. (*The Continental Store Service Company*, agt. *Clark and others*, ante, 497.)

42. Sections 606, 772—A judge of the court of common pleas is a county judge within the meaning of section 606 of the Code of Civil Procedure, and under section 772 an order may be granted by a judge of the court out of court; it may

be made by any justice of the supreme court, or by any judge of the superior court in the county wherein his court is located, or by the county judge of the county where the action is triable, or in which the attorney for the applicant resides. (*Roosevelt* agt. *Edson*, ante, 231.)

43. Section 627—Motion to continue an injunction—right of the plaintiff to furnish additional affidavits. (*See Cagney* agt. *Fisher*, 34 *Hun*, 549.)

44. Section 636—An averment in an affidavit for an attachment made by a plaintiff, "that a cause of action exists in favor of plaintiffs against said defendants for which said action is commenced, and that the amount of plaintiff's claim in said action is \$283.20, and interest from the 15th day of April, 1893, over and above all counter-claims and set-offs known to deponent," is a compliance with the requirement of this section of the Code of Civil Procedure, that plaintiff must show by affidavit that he is entitled to recover a sum stated therein, over and above all counter-claims known to him, and is sufficient to give the judge jurisdiction to grant the warrant. (*Barton* agt. *Saalfeld*, ante, 276.)

45. Section 636—The affidavit of C., on which the attachment was granted, alleges that "he is the agent and one of the salesmen for the plaintiffs herein: that at certain specified dates the plaintiffs sold and delivered to the defendant at his special instance, goods of a certain value, no part of which has been paid, although deponent has demanded payment of the defendant, and said sum is due to the plaintiffs herein from the defendant, over and above all claims and offsets:

Held, that this affidavit fulfills the requirements of this section of the Code of Civil Procedure. An agent and salesman is presumed to

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be familiar with the every day occurrences and general routine of his employer's business affairs, and to have better, or at least as good, knowledge of the condition of things between the plaintiffs and the defendant as the plaintiff himself. It is not necessary for him to account for his knowledge.

For the same reason it is not necessary for him to account for his making the affidavit in consequence of his employer's absence from the state.

Nor is the affidavit insufficient because of the omission of the clause "known to them." It is made not only by an agent, but by a salesman of the plaintiffs, and the cause of action arises out of a sale of goods; it was made on knowledge, and the well known rule of law applies that the "law will not infer that matters positively sworn to were not within the personal knowledge of the affiant." (*Bates agt. Pimstein, ante, 336.*)

46. Section 636—The presumption is that a man resides where his family and house are.

One having his domicile in this state may, by absence therefrom in another state, become a non-resident within this section of the Code, relating to attachments.

A firm as such cannot be said to have a residence. It is the individual members who have residences (*Reversing S. C., 67 How., 386.*) (*McKinlay agt. Fowler, ante, 282.*)

47. Section 636—The plaintiff's agent, after setting forth the cause of action, states that "there is now due to said plaintiff from defendant the sum of \$447.95 over and above all offsets and counter-claims known to deponent or to said plaintiff:

Held, that the clause "known to plaintiff," as used in this section of the Code of Civil Procedure, is not a jurisdictional prerequisite for the issuing of a warrant of

attachment, but must be held to be merely limiting in its character and analogous to the statutes of Michigan, Colorado and other states, which provide that the plaintiff shall set forth the "amount of the indebtedness as near as may be over all counter-claims."

The intent of the legislature in the enactment of this section considered.

The case of *Oribben agt. Schilinger* (30 Hun, 248) questioned. (*Mallory agt. Allen, ante, 316.*)

48. Section 636, sub. 1—Attachment—the affidavit must show a sum due over all counter-claims known to the plaintiff—when a reference to other papers on file is unavailing in an affidavit. (*See Smith agt. Arnold, 83 Hun, 484.*)

49. Sections 649, 650—The provision of the Code of Civil Procedure (sec. 649), providing for a levy by virtue of an attachment upon a "promissory note or other instrument for the payment of money," by "taking the same into the sheriff's actual possession," merely changes the mode of making the levy; it in no respect alters the inherent quality of such instruments as choses in action.

Under said provision a levy can only be made by obtaining the actual custody of the instrument.

Where, therefore, a sheriff, seeking to levy upon a promissory note and a bond and mortgage given as collateral thereto, which were in the hands of an agent of the attachment debtor, served upon said agent a certified copy of the warrant, together with a copy of the affidavits, and demanded the securities, which the agent refused to deliver up, or to give the certificate that he held them for the benefit of the debtor as prescribed by the Code (sec. 650), and thereupon the sheriff applied for and obtained an order requiring such delivery, and in pursuance thereof obtained possession, but between the time

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- of the demand and that of obtaining possession the debtor assigned the note: *Held*, that the sheriff acquired no lien, either by the original demand and service of copies or by the subsequent obtaining the custody of the securities, and so could not attack the title of the assignee. (*Anthony* agt. *Wood*, 96 *N. Y.*, 180.)
50. Sections 677, 678, 679 — Attaching creditor — action by him to collect the demand attached — he may impeach the good faith of an assignment of the demand. (*See Throop Grain Cleaner Co.* agt. *Smith*, 34 *Hun*, 91.)
51. Section 688 — Upon a motion, founded on the papers upon which an attachment was granted, to vacate such attachment, the justice presiding permitted an affidavit made several days after the attachment to be filed *nunc pro tunc*, as of the prior date, and to be read in support of the process: *Held*, that this ruling was erroneous, the paper not being one in any way connected with the granting of the attachment, and, therefore, was prohibited by this section of the Code from consideration when the motion to vacate was made. (*Sutherland* agt. *Brodner*, ante, 188.)
52. Section 688 — Attachment — on a motion to vacate, upon the original papers, no affidavits sustaining it can be read. (*See Sutherland* agt. *Bradner*, 34 *Hun*, 519.)
53. Section 709 — Where an attachment is set aside for irregularity, and there is no adjudication as to the ownership of the property levied on, the sheriff ought not to surrender it to a person whose claim the bond of indemnity makes it his duty to contest. This section of the Code of Civil Procedure does not apply to such a case. (*Bow* agt. *Wilkins*, ante 21.)
54. Section 723 — Power of the courts to allow amendments to be made *nunc pro tunc*. (*See Tobis* agt. *Cary*, 34 *Hun*, 481.)
55. Sections 755, 765 — Where, pending proceedings for the judicial settlement of the account of an administrator, such administrator dies, the proceedings abate and cannot be revived against his legal representatives. (*In the Estate of Washington M. Smith*, deceased, ante, 64.)
56. Section 756 — The court has power, upon application of defendant to compel the sole transferee of plaintiff's claim pending suit to be made party plaintiff, changing the rule as declared in *Packard* agt. *Wood* (17 *Abb.*, 318); *Emmett* agt. *Bowers* (23 *How.*, 300); *Howard* agt. *Taylor* (6 *Duer.*, 204); affirming the theory of *Shearman* agt. *Coman* (23 *How.*, 517.) (*De Bost* agt. *Albert Palmer Company*, ante, 508.)
57. Section 764 — Action for personal injuries — it abates upon the death of the plaintiff — the recovery of a verdict by him will not make it survive if it be reversed on appeal. (*See Kelsoy* agt. *Jewett*, 34 *Hun*, 11.)
58. Sections 768, 8334 — The bank of R. having discounted certain notes for the firm of S. H. and F. a depositor with it, and that firm, wishing to anticipate payment, gave to the bank its checks for the amount of the notes less rebate of interest; which checks the bank received and charged in the firm account, and entries were made in the bank books to the effect that the notes were paid. The firm at the time supposed that the bank held the notes, but they had in fact been previously sold by it. Before the notes became due the bank failed, and in an action brought by the attorney general in the name of the people, a receiver was appointed of its property and effects: *Held*, that

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an order requiring the receiver to pay the notes out of the funds in his hands was properly granted; that the transaction between the bank and said firm was not in their relation of debtor and creditor, nor in that of bank and depositor, but by it a trust was created, the violation of which constituted a fraud by which the bank could not profit, and to the benefit of which the receiver was not entitled.

An application for such an order is not a motion as defined by the Code of Civil Procedure (sec. 768), but a special proceeding "for the enforcement or protection of a right" (sec. 8834) in which costs may be awarded in the discretion of the court as in an action. (*The People* agt. *The City Bank of Rochester*, 96 N. Y., 33.)

59. Section 772—This section of the Code of Civil Procedure, prescribing what judges may make orders out of court without notice, with indifference as to the particular court in which the action may be, does not apply to injunction orders, in respect to which the special provision contained in section 606 controls.

A judge of the court of common pleas is not a county judge, and has not the power of one, within the meaning of section 606, providing that an injunction order can only be granted by a judge of the court where the action is, or by that court, or by a county judge.

A judge of the common pleas has not power, therefore, to grant an injunction order in an action in the superior court, and a person violating such an order is not guilty of contempt (*Reversing S. C.*, ante, 251). (*The People ex rel. Roosevelt and others* agt. *Edison*, ante, 483.)

60. Section 770—The stay of proceedings for the non-payment of costs, provided for in this section of the Code of Civil Procedure,

does not operate to stay proceedings until default in payment; and such default does not exist until the expiration of ten days from the service of the order, or the time fixed in the order. (*Pettibone* agt. *Drakeford*, ante, 141.)

61. Section 784—A general term has no power to compel a party to accept notice of appeal after the time for appealing has expired, as this would be in effect to allow an appeal, which courts are expressly prohibited from doing, after the expiration of the time fixed by law for such appeal. (*Clapp et al.* agt. *Hawley et al.*, 97 N. Y., 610.)

62. Section 812—Undertaking on appeal—when the guaranty of a corporation will be accepted in the place of sureties. (*See Hurd* agt. *Hannibal and St. Joseph R. R. Co.*, 38 Hun, 109.)

63. Section 814—An executor who is directed to sell real estate and invest the proceeds is liable for damages to the aggrieved party, unless he performs his duty faithfully, although the time and manner of sale is left to his discretion.

In such a case the surrogate has no jurisdiction in an action or special proceeding to recover such damages.

This section of the Code of Civil Procedure allows an action to be maintained in the name of the party interested against the sureties of such executors for such neglect of duty upon leave being granted by the supreme court.

Proceedings before the surrogate have not been prescribed for such a breach of the bond. (*Haight* agt. *Brislin*, ante, 199.)

64. Section 829—In the trial of a proceeding for the probate of a decedent's will, one who is named as legatee in the disputed paper is incompetent, under this section of the Code of Civil Procedure (save in the cases therein excepted), to

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- testify in his own interest concerning a personal transaction or communication between himself and the decedent. (*In the Estate of Anna Voorhis, deceased, ante, 261.*)
65. Section 829 — Presumption — a check is presumed to be given in payment of a debt due — evidence — when inadmissible as being too remote — when an administrator is debarred from testifying by section 829 of the Code of Civil Procedure. (*See Poucher agt. Scott, 33 Hun, 238.*)
66. Section 829 — Evidence — what testimony of a party is inadmissible as relating to a personal transaction with a deceased person. (*See Price agt. Price, 23 Hun, 69.*)
67. Section 829 — Evidence — testimony as to a personal transaction with a deceased person. (*See Kelly agt. Burroughs, 33 Hun, 319.*)
68. Section 829 — Evidence — a judgment creditor does not claim or hold an interest under the debtor within the meaning of this section of the Code of Civil Procedure. (*See Gillies agt. Kreuder, 33 Hun, 314.*)
69. Section 829 — Promissory note — validity of one given by a husband to his wife — when the testimony of a party is inadmissible under this section. (*See Benedict agt. Driggs, 34 Hun, 94.*)
70. Section 837 — Although a defendant may be excused from answering questions, under the provisions of this section of the Code of Civil Procedure, as to penalties, still this action is not such a penalty as will excuse the defendant from answering questions which would tend to expose him to a verdict under chapter 510 of the Laws of 1875. (*Geisenheimer agt. Dodge, ante, 264.*)
71. Section 844 — Who may take an affidavit out of this State to be used in it — Code of Civil Procedure, sec. 844 — it applies to foreign countries — form of jurat and of the certificate of the clerk — 1870, chap. 203. (*See Ross agt. Wigg, 34 Hun, 192.*)
72. Section 870 — Examination of a party before trial — it may be granted in an action to recover property fraudulently obtained. (*See Davenport Glucose Mfg. Co. agt. Taussig, 33 Hun, 32.*)
73. Section 873 — The affidavit required to procure an order for the examination of a party before trial should state the nature of the action, and the substance of the cause of action, and of the judgment demanded therein. An affidavit which does not truly contain these requirements is insufficient. Where the affidavit of the plaintiff only showed that he was ignorant as to whether he had a cause of action:
Held, that such want of knowledge on his part is no justification for the order. He should know before commencing his action the true cause thereof, and its substance should be set out. (*Kaufman agt. Hersfield, ante, 444.*)
74. Section 873 — An examination of a plaintiff, will not be allowed, for the purpose of discovering what consideration the plaintiff paid for the note sued on, and which was misappropriated by the party to whom it had been intrusted to procure its discount and return the proceeds to the makers. An examination will not be allowed in a case where a bill of discovery could not be maintained. Where the object for which the examination is sought by the petitioner, is for the purpose of discovering whether the plaintiffs can maintain their cause of action, the nature and number of their witnesses, or of determining whether the plaintiffs have title to the note, or else to anticipate per-

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jury, the application will be denied. (*Wrasier et al. agt. Davids et al., ante, 490.*)

75. Section 910 — Evidence — when the deposition of a witness taken out of the State may be read although the witness be in court — the deposition can only be suppressed by a special motion. (*See Hedges agt. Williams, 33 Hun, 546.*)

76. Section 968 — In an action for the recovery of money only, and so necessarily triable by a jury, in which, if so tried, an interlocutory judgment could not be given, if a jury is waived and the case tried by the court, and if a proper case is made out, such a judgment may be rendered, the same as if the action were originally triable by the court. (*Cornell agt. Cornell et al., 96 N. Y., 108.*)

77. Sections 972, 1003 — The provisions of these sections of the Code of Civil Procedure providing for the determination of the other issues of fact in an equity case where one or more specific questions have been submitted to a jury, and also for the review of the verdict of the jury upon the questions submitted, do not change the old practice; and the verdict of the jury, although a motion for a new trial has been denied, is not conclusive upon the court on the final hearing of the action, but may be disregarded. (*Learned agt. Tillotson, 97 N. Y., 1.*)

78. Sections 963, 987 — An action brought to set aside an assignment for the benefit of creditors, on the ground that it was made to hinder, delay and defraud the assignor's creditors, where the assigned property consists in part of real estate, situate in this state, is within the meaning of the Code of Civil Procedure (*sec. 982*), a local action, as it is an action to annul a title and to affect an estate in real property.

Such an action, therefore, must be tried in the county where the

real estate or some portion thereof is situated.

The absence of any averments in the complaint in such an action disclosing that the assignment embraces real property is no answer to a motion on the part of defendant to change the place of trial. The plaintiff cannot, by such an omission, preclude defendant from availing himself of his right to have the trial in the proper county; and the facts may be shown by affidavits.

Nor is it an answer to the motion that the assignment embraces personal property within the county stated as the place of trial in the summons; the location of the real estate controls.

Upon such a motion the power of the court to change the place of trial for the convenience of witnesses or other cause, if it exists, as to which, *quære* (*sec. 967*), may not be invoked; that power can only be exercised upon motion made after the action is put in the situation in which defendants were entitled to have it placed when it was commenced. (*Acker et al. agt. Leland et al., 96 N. Y., 383.*)

79. Section 999 — Motion for a new trial on the minutes — when an appearance and consent estops a party from denying the regularity of a motion, or the jurisdiction of the court to hear it — power of the court to reconsider a decision during the circuit at which it was made. (*See Emmerich agt. Hefferan, 33 Hun, 54.*)

80. Section 1019 — A referee is not bound to part with his report without the payment of his legal fees; and where a referee has his report ready within the statutory time, and offers to deliver it on payment of his legal fees, the same is a sufficient delivery, pursuant to this section of the Code of Civil Procedure, to prevent the statute from operating as a forfeiture of his fees and a termination of the reference (*Reversing S. C. 67 How., 1; Thorne*

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- ton agt. *Thornton*, 66 *How.*, 119, approved). (*Little* agt. *Lynch*, ante, 96.)
81. Section 1019—Reference—what is a sufficient delivery of the report to prevent either party from terminating it (*See Little* agt. *Lynch*, 84 *Hun*, 896.)
82. Section 1023—Requests for findings of fact and conclusions of law—the court must pass upon each of them—it cannot reject them as unnecessary. (*See Goetting* agt. *Behler*, 88 *Hun*, 500.)
83. Section 1023—Practice—a report cannot be sent back to a referee for additional findings—General Rule No. 82. (*See Gardiner* agt. *Schwab*, 84 *Hun*, 582.)
84. Section 1023—Where the record on appeal, in a case tried by the court, contained a paper headed "requests to find," also another paper containing exceptions to assumed refusals of the requests, but there was no "note upon the margin" of the requests as required by this section of the Code of Civil Procedure, or elsewhere, showing how, if at all, the propositions were disposed of, or that the attention of the court had been called to them: *Held*, that said assumed requests could not be considered in determining the appeal. (*Harris* agt. *Van Wart*, 96 *N. Y.*, 642.)
85. Section 1204—Practice—right of a defendant to have a controversy between himself and a co-defendant settled; it only applies to causes of action connected with the one upon which the action is brought. (*See Rafferty* agt. *Williams*, 84 *Hun*, 544.)
86. Sections 1228, 1231—A draft of judgment in an action tried by the court, which was filed in the county clerk's office for the purpose of entry, had appended to it the signature of the judge rendering the decision. No copy of such signature was appended to the paper purporting to be a copy of the judgment, as entered, served on the defeated party: *Held*, that this did not affect the regularity of the copy served; that on filing the decision, it was the duty of the clerk to enter judgment in conformity therewith, without further warrant (*see* 1228); he might himself prepare and enter it or adopt the draft presented, and so the signature was no part of the judgment, and was wholly superfluous.
- It is only where an interlocutory judgment is rendered, with a direction that a final judgment be settled by the court or referee, that the signature of the judge or referee to the final judgment is required. (*Clapp et al.* agt. *Hawley et al.*, 97 *N. Y.*, 610.)
87. Section 1290—Motion to vacate a judgment because of fraud—when it may be made by one not a party to it:—when the application need not be made within two years from the filing of the judgment-roll. (*See Marshall* agt. *McGee*, 88 *Hun*, 354.)
88. Section 1324—Undertaking on appeal—when the guaranty of a corporation will be accepted in the place of sureties—1881, chap. 486. (*See Hurd* agt. *Hannibal and St. Joseph R. R. Co.*, 88 *Hun*, 109.)
89. Section 1335—Undertaking on appeal—when invalidated by the refusal of the sureties to justify. (*See Hoffman* agt. *Smith*, 84 *Hun*, 485.)
90. Section 1856—Appeal from an order of the general term modifying a peremptory writ of *mandamus*—Code of Civil Procedure, secs. 190, 191, 2070. (*See People ex rel. Collins* agt. *Spicer*, 84 *Hun*, 584.)
91. Section 1857—Improper assessment of tax—application to county judge to have it refunded

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- an appeal lies from his order to the general term — Code of Civil Procedure, sec. 1857 — 1869, chap. 855, sec. 5, as amended by chap. 695 of 1871 — 1884, chap. 141 — when a tax will not be refunded because of an error in the manner of assessing it — when an original act is not revived by the repeal of the amendatory act. (*See Harris agt. Supervisors of Niagara County*, 83 Hun, 279.)
93. Sections 1421 to 1427 — In an action against the sheriff for an alleged trespass in seizing and converting plaintiff's property, it is a fatal objection to an order discharging the sheriff from liability, and substituting in his place as defendants several persons who claim to have indemnified him for his acts, that the moving papers fail to show that the applicants became indemnitors to the sheriff before the commencement of the action.
- The provisions of the Code restricting the remedy of a party to the indemnitors of the sheriff, would seem to contemplate a seizure by that officer of property under a single execution or attachment, and the substitution of indemnitors liable upon a single bond, where the liability of the obligors is necessarily co-extensive with that of the officer whose position as defendant they seek to occupy, and not the substitution of numerous indemnitors liable for distinct and separate levies where each applicant is made joint defendant with numerous applicants, applying by other attorneys, and in separate proceedings, although the individual consents of each of the several indemnitors appearing in the record authorize only an order making the applicant alone a party defendant in the action. (*Hayes agt. Davidson*, ante, 810.)
98. Section 1421 — Action against a sheriff for the wrongful seizure of goods — when creditors who have severally indemnified the sheriff may be allowed to defend the action. (*See Hayes agt. Davidson*, 84 Hun, 243.)
94. Section 1526 — Action of ejectment — recovery of possession by the plaintiff, under a judgment which is reversed on appeal — right of the defendant to be placed in possession again. (*See Conger agt. Duryee*, 84 Hun, 560.)
95. Section 1536 — Partition — if the clerk of the court is appointed guardian *ad litem* for an infant defendant in an action of partition, he must give security. (*See Fisher agt. Lyon*, 84 Hun, 188.)
96. Section 1720 — Where in a complaint in replevin to recover the possession of personal property it was averred (1), that the defendant detains the property set out in the schedule from the plaintiff; (2), that one Emma N. Scovill (not the defendant) executed and delivered to the plaintiff a chattel mortgage upon the property; (3), that by the terms of the mortgage the plaintiff had become entitled to the possession of the property; (4), that the defendant had its possession; and (5), refused to deliver it to the plaintiff on demand:
- Held*, that the complaint is fatally defective, because it is not averred that the plaintiff is the owner or has title to the property, nor that he had the right of possession by virtue of a special property therein, as required by this section of the Code of Civil Procedure. (*Gardner agt. Scovill*, ante, 272.)
97. Sections 1772, 1778 — Judgment for alimony — if the defendant fails to pay it he may be punished for a contempt — Code of Civil Procedure, secs. 1772, 1778, 2286. (*See Ryckman agt. Ryckman*, 84 Hun, 235.)
98. Sections 1772, 1778 — Failure to pay alimony — commitment for

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contempt—form of the order—inability to pay no excuse, if caused by the voluntary act of the party—Code of Civil Procedure, sec. 2386 (*See Ryer* agt. *Ryer*, 83 *Hun*, 116.)

99. Section 1773—Power of a court of equity to strike out the defense of a party disobeying its orders. (*See Brisbane* agt. *Brisbane*, 84 *Hun*, 889.)

100. Section 1809—This section of the Code of Civil Procedure does not apply to the corporation of the city of New York, nor to any officer thereof. (*Roosevelt* agt. *Edson*, ante, 231.)

101. Section 1866—By the provisions of this section of the Code of Civil Procedure, a devisee in a will is vested with the right to bring his action to determine the true effect and meaning of a devise to him of real estate; and he has a right to require, by action brought for that purpose, the judgment of the supreme court, as to the intent and meaning of a testator in making a testamentary disposition of real estate, so far as the same involves the interests of the devisees. (*Jones* agt. *Jones*, ante, 510.)

102. Section 1897—Action for penalties in a justice's court—a proper reference to the statute must be indorsed upon the summons. (*See Hitchman* agt. *Baxter*, 84 *Hun*, 271.)

103. Section 1897—Action to recover a penalty under the excise law—the reference to the statute upon the summons—when it is sufficient. (*See Ripley* agt. *McCann*, 84 *Hun*, 112.)

104. Sections 1902, 1904, 3253—In an action brought under section 1902 of the Code of Civil Procedure, by an administrator to recover compensation for the death of a son of the deceased father, in a

difficult and extraordinary case, an extra allowance may be made, and should be computed not upon the amount of the verdict only, but upon such amount with interest added from the date of the death.

In actions of this character "the sum recovered" is not only the amount of the verdict, which represents only the judgment of the jury as to what would be a "fair and just compensation for the pecuniary injuries" to the plaintiff, but also the interest upon such amount from the date of the death.

That such interest is required by express statutory enactment (*Code of Civil Procedure*, sec. 1904) to be added, does not make such addition anything other or different than a part of "the sum recovered." (*Bord* agt. *N. Y. C. and H. R. R. Co.*, ante 1.)

105. Section 1925—Taxpayer—he cannot sue a *bona fide* holder for value of town bonds, to have them canceled. (*See Alcord* agt. *Syracuse Savings Bank*, 84 *Hun*, 142.)

106. 2015, 2058—An order directing a further return to a writ of *habeas corpus* or *certiorari*, issued under the Code of Civil Procedure (sec. 2015 *et seq.*), to inquire into the cause of detention of a person, is not appealable (sec. 2058); and the general term of the supreme court has no authority to review it. (*Matter of Larson*, 96 *N. Y.*, 381.)

107. Section 2070—Appeal from an order of the general term modifying a peremptory writ of *mandamus*—Code of Civil Procedure, secs. 190, 191, 1356. (*See People* *ex rel. Collins* agt. *Spicer*, 84 *Hun*, 584.)

108. Section 2129—A writ of *certiorari* was directed to the board as such: *Held*, that as the board was a mere department of the city government (*chap. 335, Laws of 1873*), and no action could be brought against it by its official

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- name, the writ was irregular; it should have been directed to the members of the board "by their names." (*People ex rel. agt. Board of Comrs., dec., of N. Y., 97 N. Y., 87.*)
109. Section 2140 — Where, upon return to writ of *certiorari* to review a decision of the assessors upon such a claim, certifying that no damages had been sustained, it was conceded that damages were in fact sustained, but the assessors arrived at their conclusion by offsetting benefits: *Held*, that a question of law was presented and the decision of the assessors thereon was open to review; also, that the decision was erroneous. (*The People ex rel. agt. Zoll, 97 N. Y., 808.*)
110. Sections 2141, 2146, 2147, 2164 — A receiver may be appointed on the conclusion of the examination of a third person in supplementary proceedings, either before or after the return of the execution against the judgment debtor. (*De Visser et al. agt. Smyth, ante, 48.*)
111. Section 2282 — Summary proceedings to recover land by a purchaser at a sale under execution — the validity of the judgment cannot be attacked collaterally therein. (*See Getting agt. Mohr, 34 Hun, 840.*)
112. Section 2260 — Costs — when to be allowed, as of course, to a successful applicant, on appeal from a judgment of dispossession in summary proceedings — Code of Civil Procedure, secs. 8086, 8240. (*See Harrison agt. Stuart, 34 Hun, 259.*)
113. Section 2260 — A new trial cannot be had in a county court on an appeal from a judgment in summary proceedings — Code of Civil Procedure, sec. 8088. (*See Brown agt. Cassidy, 34 Hun, 55.*)
114. Section 2284 — Contempt of court, by the violation of an injunction — the expenses of the proceedings to punish the guilty party may be included in the fine. (*See Brett agt. Brett, 33 Hun, 547.*)
115. Section 2286 — Failure to pay alimony — commitment for contempt — form of the order — Code of Civil Procedure, secs. 1772, 1773 — Inability to pay no excuse if caused by the voluntary act of the party. (*See Ryer agt. Ryer, 33 Hun, 116.*)
116. Section 2286 — Judgment for alimony — if the defendant fails to pay it he may be punished for a contempt — Code of Civil Procedure, secs. 1772, 1773. (*See Ryckman agt. Ryckman, 34 Hun, 235.*)
117. Section 2426 — This section of the Code of Civil Procedure requires the report of the referee to contain "a statement of the effects, credits and other property and of the debts and other engagements of the corporation and of all other matters pertaining to its affairs: *Held*, that the requirement of the Code is one of substance and not of form, and a failure to comply with it renders the final order void. (*In re The E. M. Boynton Saw and File Co., ante, 69.*)
118. Section 2426 — Voluntary dissolution of a corporation — Code of Civil Procedure, chap. 17, tit. 11 — a receiver cannot be appointed until the entry of the final order of dissolution — the report of the referee must contain the statement required by it. (*See Matter of E. M. Boynton Saw and File Co., 34 Hun, 369.*)
119. Section 2429 — The court has no power to appoint a receiver under proceedings for the voluntary dissolution of a corporation until the making of the final order dissolving the corporation. (*In re The E. M. Boynton Saw and File Co., ante, 69.*)

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120. Sections 2447, 2456—In proceedings supplementary to execution, after examination, a motion was made to compel defendant to pay \$215 to a receiver theretofore regularly appointed, which sum plaintiff claimed defendant was entitled to receive from a third party, and which defendant claimed to have disposed of by delivering to his attorney before service of the second order. An order was made referring this question of fact to a referee, who took testimony and made his report in substance that defendant's claim was true, which report was confirmed:

Held, that under section 2456 of the Code the justice properly allowed defendant his costs and disbursements and charged plaintiff therewith.

Held, also, that a provision in said order that defendant first pay the fees of the referee and stenographer amounted in effect to a direction that said judgment be satisfied *pro tanto*, and in this said order was without authority of law, and that under section 2447 of the Code the justice was vested only with power to direct the application of any money or property in the possession or under the control of the defendant belonging to him to a sheriff designated in the order or to a receiver, if one was appointed. (*Boelger* agt. *Swivel*, ante, 372.)

121. Sections 2457, 2462—Contempt—an order requiring a person to show cause why he should not be punished, made by a county judge whose term expires before the return day, may be heard by his successor—Code of Civil Procedure, sec. 52. (*See Gammon* agt. *Berry*, 34 Hun, 183.)

122. Sections 2481, 1282, 1291—A petition for the vacation of certain decrees made by a surrogate upon several accountings, by one who was an infant at the time the decrees were made, where the

ground of relief is the infancy of the party applying, must be made within one year from the time the petitioner attains his majority. (*Matter of Several Accountings, &c.*, of *William Tilden*, deceased, ante, 409.)

123. Section 2533—A surrogate has power, on motion, to strike out allegations contained in a petition for the revocation of probate of a will, as irrelevant and redundant. (*In the Estate of James G. Henry*, ante, 297.)

124. Sections 2552, 2555—Contempt—the failure of an executor to pay over money as required by the terms of a decree, is punishable as a contempt. (*See Matter of Snyder*, 34 Hun, 302.)

125. Section 2554—Docketing of decrees of a surrogate—form of the execution to be issued upon them. (*See Bingham* agt. *Burlingame*, 33 Hun, 211.)

126. Section 2558—Surrogate—when he cannot grant an allowance to a special guardian upon his *ex parte* application therefor—the provision as to costs and allowances should be inserted in the decree. (*See Matter of Budlong*, 33 Hun, 285.)

127. Section 2572, 2577—The requirements of these sections of the Code of Civil Procedure and the requirements of Rules 82 and 83 of the General Rules of Practice, are entirely independent of each other, and the surrogate may at any time after the entry of the decree or order sought to be reviewed, extend the time for making and serving a case, even though the appeal has not been perfected, provided that the time for perfecting it is as yet unexpired. (*In the Estate of James Tilby*, ante, 452.)

128. Section 2587—The surrogate disallowed the claim of the mother

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of the testatrix to said one sixth, and directed the whole residuary estate to be invested and retained by the executor until the infant child died or became of age; the mother did not appeal. The executor appealed in 1880 from other parts of the decree. In her answer to the appeal, the mother alleged said portions of the decree to be erroneous: *Held*, that the general term had jurisdiction to review and to reverse said decision (*Rule 42 of Supreme Court of 1878*). (*Freeman agt. Coit et al.*, 96 N. Y., 63.)

129. Section 2606 — By this section of the Code of Civil Procedure, as amended in 1884, the surrogate can require an accounting from a representative of a deceased executor or administrator, just as he might require it from the deceased executor or administrator himself after the revocation of his letters. Therefore where an administrator dies pending proceedings for the settlement of his accounts, in a new proceeding, his legal representatives can be directed to render a full account of such administrator's management of decedent's estate. (*In the Estate of Washington M. Smith, deceased*, ante, 64.)

130. Section 2606 — Surrogate's court — right of an administrator to compel the executor of his predecessor to account. (*See Matter of Lutz*, 83 Hun, 618.)

131. Section 2786 — Commissions, at the rates fixed by the statute, are allowed only by an order of the court on the settlement of the executor's account, but the right to such commissions cannot be withheld by the court except in certain cases, as where specific compensation is provided.

Where, on January 14, 1884, letters testamentary were issued to three executors, and on July 15, 1884, one of such executors died, after having acted up to that time,

the estate amounting to more than \$100,000:

Held, that on the final accounting, three full commissions should be allowed and apportioned among them, according to the services rendered by each executor. (*Matter of the Estate of William R. Walling*, ante, 327.)

132. Section 2739 — Where an executor, having a claim against the estate, duly assigns such claim, his assignee may maintain an action thereon the same as any other creditor; he is not confined to the remedy provided by statute to enable the executor himself to enforce his claim. (*Snyder agt. Snyder et al.*, 96 N. Y., 88.)

133. Section 2743 — The surrogate has jurisdiction, upon entering a decree for the judicial settlement of an executor's account, to determine who are testator's legatees, and to what sums they are respectively entitled, and in spite of the limitations of this section of the Code of Civil Procedure, he may exercise such jurisdiction in respect to legacies whose validity is disputed by the executor, and even in cases where such determination necessarily involves the construction of the testator's will. (*In the Estate of Joshua York, deceased*, ante, 16.)

134. Section 2784 — Sale of real estate to pay the debts of a decedent — the provisions of the statute must be strictly complied with — what errors may be disregarded or cured under this section of the Code of Civil Procedure. (*See Matter of Mahoney*, 84 Hun, 501.)

135. Section 2818 — The surrogate has authority, in appointing successors to testamentary trustees, to require them to give security for the faithful discharge of their duties. (*In the Estate of John Whitehead, deceased*, ante, 90.)

136. Section 2917 — The proceed-

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ings in a district court incident to the application for the granting and the execution of the warrant of attachment, and the duties of the justice and the clerk with respect to those proceedings, are now the same as are prescribed by the district court act; but if we wish to ascertain when and for what causes an attachment may be granted, for what reason it may be dissolved, and what effect upon the action will be produced by the vacating of the attachment, we must look to article 4 of the Code of Civil Procedure.

By section 2917 of the Code of Civil Procedure the attachment is now only a provisional remedy, and an error of the justice in regard to such a remedy will not cause the reversal of the judgment if the action were properly decided upon its merits.

At present there is no remedy for a party aggrieved if a district court errs in upholding or in vacating a provisional remedy. The decision of the justice cannot be reviewed on appeal (*This is adverse to Lang* agt. *Marks*, 65 *Hun.*, 127). (*Rosenthal* agt. *Grouse*, *ante*, 447.)

137. Sections 8044, 8045—Appeal — none lies to a court of sessions from a judgment of the special sessions charging a prosecutor with costs—Code of Criminal Procedure, secs. 719, 720, 749. (*See People* agt. *Norton*, 33 *Hun.*, 277.)

138. Section 3066—Costs—when to be allowed, as of course, to a successful appellant, on appeal from a judgment of dispossession in summary proceedings—Code of Civil Procedure, secs. 2260, 3240. (*See Harrison* agt. *Swart*, 34 *Hun.*, 259.)

139. Section 3068—A new trial cannot be had in the county court on an appeal from a judgment in summary proceedings—Code of Civil Procedure, sec. 2260.

(*See Brown* agt. *Cassidy*, 34 *Hun.*, 55.)

140. Sections 3096, 3108—In proceedings under chapter 19, title 10 of the Code of Civil Procedure, relating to an animal straying upon the highway, where the person to whom the precept was directed by name is personally served or appears and answers, the theory of the statute is to give him damages, where he succeeds upon the trial of the issue *only* when the seizure is found to be malicious and without probable cause, and only then in the special proceeding where the issue is decided in his favor. All the issues are to be determined in one special proceeding, and not a part tried in a special proceeding and a part in an action.

Where, as in this case, the precept was directed to the plaintiff in this action by his name and he was personally served, and he appeared and answered, unless the justice found that the seizure was malicious and without probable cause, he was not entitled to recover any damages under the statute, as section 3108 expressly excludes him from maintaining such an action. (*Millard* agt. *Soverance*, *ante*, 521.)

141. Sections 3210, 3211—The provisions of these sections of the Code of Civil Procedure in relation to provisional remedies in the district civil courts, are in conflict. (*Rosenthal* agt. *Grouse*, *ante*, 447.)

142. Section 3234—Where plaintiff had a verdict for forty-four dollars and nine cents, and judgment was entered for that sum, the defendant being entitled to costs, another judgment was entered for seventy-four dollars and ninety-four cents costs in his favor. The judgment in favor of the plaintiff, after its entry, and before the judgment was entered in favor of the defendant, was, by the plaintiff assigned to his attor

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neys in the action in consideration of their services as such attorneys:

Held, that there were two judgments entered in this action, where properly there could be only one, and that based upon the verdict, and in such case the lesser amount should be set-off as against the larger of the sums to which the respective parties are entitled, and the judgment be effectual for the difference in favor of the party entitled to it. This right is one of the incidents of the action, and is superior to the lien of the attorneys or to the effect of an assignment. (*Warden* agt. *Frost*, ante, 364.)

143. Sections 3239, 3251 — Upon a motion for a new trial, made at special term upon a case, the appellant is entitled to costs, twenty dollars before argument, and forty dollars for argument where an appeal is taken from an order denying said motion, as well as from the judgment entered in the action under subdivision 3 of section 3251 of the Code of Civil Procedure. Subdivision 2 of section 3239 does not prevent the allowance of such costs. (*Pilgrim* agt. *Donnelly*, ante, 281.)

144. Section 3240 — Costs — when to be allowed, as of course, to a successful appellant, on appeal from a judgment of dispossession in summary proceedings — Code of Civil Procedure, secs. 2260, 3066. (*See Harrison* agt. *Swart*, 34 *Hun*, 259.)

145. Section 3250 — Costs — the plaintiff is entitled thereto, in an action for a violation of chapter 237 of 1878, although the recovery is less than fifty dollars. (*See Furman* agt. *Cunningham*, 34 *Hun*, 606.)

146. Section 3251, sub. 3 — Costs — no trial fee allowed where the action is discontinued before a

trial is actually had. (*See Stowell* agt. *Baxter*, 33 *Hun*, 381.)

147. Sections 3268-3271 — Where an official assignee of a debtor sues upon a cause of action arising "before the assignment," he may be required by the defendant as of right to give security for costs. (*Welch* agt. *Gaffney*, ante, 146.)

148. Sections 3268, 3278 — Mere presence in the state during business hours does not constitute residence, so as to relieve an attorney from his liability for costs, under section 3278 of the Code of Civil Procedure.

It is no answer under this section that the attorney commenced the action in good faith and in the belief that the plaintiff and his family were domiciled in New York.

Nor does the omission of the defendant to demand security for costs during the pendency of the action affect the attorney's liability. (*Krom* agt. *Kurscheidt*, ante, 38.)

149. Section 3307, sub. 2 — Fees of sheriff on attaching property — when the judge cannot compel the party liable therefor to pay them. (*See Hall* agt. *U. S. Reflector Co.*, 34 *Hun*, 467.)

150. Chapter 17, title 11 — Voluntary dissolution of a corporation — a receiver cannot be appointed until the entry of the final order of dissolution — Code of Civil Procedure, section 2426 — the report of the referee must contain the statement required by it. (*See Matter of E. M. Boynton Saw and File Co.*, 34 *Hun*, 369.)

CODE OF CRIMINAL PROCEDURE

1. Sections 23, 963 — The provision of the Code of Civil Procedure (sec. 23, as amended by chap.

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800, *Laws of 1883*), directing the holding of courts of oyer and terminer "by a justice of the supreme court without an associate" is not affected by the provision (*sec. 962*) declaring that all "actions and proceedings theretofore commenced must be conducted in the same manner as if this Code had not been passed." This last provision simply preserves the existing rules of procedure in pending cases; it does not continue the then existing organization of criminal courts.

The legislature had power to authorize judgment by a court constituted as prescribed by said provision, to be pronounced upon a conviction had in a court of oyer and terminer before the amendment of said provision in 1882, as the amendment simply changes the organization without affecting the essential character of the court.

The organization of said court, with the exception that a justice of the supreme court must preside, is within the control of the legislature.

The provision of the act of 1863 (*chap. 226, Laws of 1863*), providing "that the appellate court shall have power upon any writ of error," upon reversal of judgment, where it appears that the conviction was legal and regular, "to remit the record to the court in which such conviction was had, to pass such sentence as the appellate court shall direct," was not repealed by the Code of Civil Procedure, so far as actions then pending are concerned, but is continued in force as a rule of procedure in respect to such actions (*sec. 962*), and is applicable, although the case be brought up by appeal as authorized by said Code, instead of by writ of error. (*The People agt. Bork, 96 N. Y., 189.*)

3. Sections 238, 239 — Under the Code of Criminal Procedure a defendant, held to answer a criminal

charge, may not, on the return of the grand jury list and before indictment, take the objection that the law under which the grand jury was selected is unconstitutional. The court may, in its discretion, discharge the panel for causes specified (*sec. 238*), and a defendant may interpose a challenge to an individual grand juror (*sec. 239*), but his right to challenge the body of the grand jury because irregularly or defectively constituted no longer exists. (*The People agt. Hoogherk, 96 N. Y., 149.*)

3. Sections 273, 275, 276, 284, 321, 323 — It was not intended by the provision of the Code of Criminal Procedure (*sec. 273*), abolishing existing forms of pleading in criminal actions, to set aside the judicial construction theretofore given to the language usually employed in such pleadings; its true office is to abrogate the technical rules formerly governing such pleadings, and to substitute simpler forms and a more liberal interpretation.

In an indictment under said Code for murder in the first degree it is not necessary that the particular intent with which the homicide was committed shall be set forth; it is sufficient to allege that it was done feloniously, with malice aforethought, and contrary to the form of the statute (*Secs. 275, 284.*)

The objection that an indictment does not conform to the requirements of the Code of Criminal Procedure (*secs. 275, 276*) may only be taken by demurrer (*Secs. 321, 323*). (*The People agt. Conroy, 97 N. Y., 62.*)

4. Sections 306, 327 — Upon the arraignment of a prisoner without counsel the law (*sec. 306*) requires that "he must be asked if he desire the aid of counsel, and if he does the court must assign counsel." The duty of assigning counsel carries with it the power, and the further

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duty to do whatever is necessary and proper to be done to enable the assigned counsel to discharge the trust which the court has devolved upon him.

Where a prisoner is entirely unable to furnish the money to defray the cost of transcribing the stenographer's notes, and counsel who have been assigned for his defenses deposes that a proper discharge of the duties devolved upon him by the court requires a presentation of the case to the appellate tribunal, the court should provide the means necessary to enable him to do that which the court has enjoined.

And in a proper case the court will upon motion in behalf of the prisoner direct that a copy of the stenographer's notes of the trial be furnished his counsel at the expense of the county. (*The People* agt. *Willett*, ante, 196.)

5. Section 876 — Under this section of the Code of Criminal Procedure a person who has formed or expressed an opinion or impression in reference to the guilt or innocence of the defendant is still, as formerly, disqualified to sit as a juror on the trial of a criminal action, unless he declares on oath, substantially, that he believes such opinion or impression will not influence his verdict, and that he can render an impartial verdict according to the evidence. It is not sufficient for him to declare that he supposes he can determine the case according to the evidence, or that his opinion ought not to influence his verdict. (*The People* agt. *Casey*, 96 N. Y., 115.)

6. Section 899 — Evidence — when admissible as tending to corroborate other testimony — "Accomplice" — meaning of, as used in this section of the Code of Criminal Procedure. (*See People* agt. *Vedder*, 84 Hun, 280.)

7. Section 899 — The provision of this section of the Code, prohibit-

ing a conviction in a criminal trial on the testimony of an accomplice, "unless he be corroborated by such other evidence as tends to connect the defendant with the commission of the crime," does not require that the whole case shall be proved outside of the testimony of the accomplice, but simply requires evidence, from an independent source, of some material fact tending to show not only that the crime has been committed, but that the defendant was implicated in it. (*The People* agt. *Hooghkerk*, 96 N. Y., 149.)

8. Section 399 — The proof as to what occurred when the plan was suggested, and also after defendant returned with the check, in reference to the alteration thereof, was the uncorroborated testimony of an accomplice: *Held*, that there was other testimony tending "to connect the defendant with the commission of the crime," sufficient to meet the requirements of this section of the Code of Criminal Procedure, prohibiting a conviction on the uncorroborated testimony of an accomplice. (*People* agt. *Ryland*, 97 N. Y. 126.)

9. Section 515 — Abandonment of a wife by her husband — the decision of a police justice may be reviewed upon a *certiorari* — the justice does not act as a court of special sessions. (*See People* ex rel. *Scherer* agt. *Walsh*, 88 Hun, 345.)

10. Section 527 — Failure to arraign a prisoner and to require him to plead — when it does not afford a ground for the reversal of his conviction. (*See People* agt. *Oosterhout*, 84 Hun, 280.)

11. Sections 719, 720 — Appeal — none lies to a court of sessions from a judgment of the special sessions charging a prosecutor with costs — Code of Criminal Procedure, sec. 749 — Code of Civil Procedure, secs. 3044, 3045.

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(See *People* agt. *Norton*, 33 *Hun*, 277.)

12. Section 749 — Appeal — none lies to a court of sessions from a judgment of the special sessions charging a prosecutor with costs — Code of Criminal Procedure, secs. 719, 720 — Code of Civil Procedure, secs. 804, 8045. (See *People* agt. *Norton*, 33 *Hun*, 277.)

13. Section 749 — Abandonment of a wife by her husband — the decision of a police justice may be reviewed upon a *certiorari* — the justice does not act as a court of special sessions. (See *People* ex rel. *Scherer* agt. *Walsh*, 33 *Hun*, 345.)

14. Section 851 — Undertaking on an appeal in bastardy proceedings — form of it — the court of sessions cannot allow it to be amended, when defective. (See *Ramsay* agt. *Childs*, 34 *Hun*, 329.)

15. Section 899 — Abandonment of a wife by her husband — the decision of a police justice may be reviewed upon a *certiorari* — the justice does not act as a court of special sessions. (See *People* ex rel. *Scherer* agt. *Walsh*, 33 *Hun*, 345.)

16. Section 899 — The common-law remedy by indictment against a person keeping a bawdy-house was not abolished or superseded by the provision of this section of the Code of Criminal Procedure as to disorderly persons. (*The People* ex rel. agt. *Sadler*, 97 *N. Y.*, 146.)

CODE OF PROCEDURE.

1. Sections 334, 338 — After two sureties, A. and B., had executed a joint and several undertaking under these sections of the old Code for a stay of proceedings on appeal, A. justified, but when subsequently B. was examined, the

justice before whom the examination took place filed a memorandum that he was not qualified, and that defendant in that action must produce another surety. Meantime, intermediate the filing of the memorandum and the entry of an order thereon, the defendant executed the undertakings upon which this action was brought, which were approved:

Held, that by the memorandum and order referred to, the justice approved of A. as one of the sureties upon the undertakings; that it was not necessary that A. should join in the execution of the undertakings with defendant, and even if A. is not liable upon his undertaking, for want of a formal indorsement of approval upon it, the defendant should not be relieved from liability on his undertakings, which stayed plaintiff's proceedings. (*Hooker* agt. *Townsend*, ante, 107.)

COMMISSIONS.

See EXECUTORS AND ADMINISTRATORS.

In the Estate of Edwin D. Morgan, deceased, ante, 183.

Matter of the Estate of William R. Welling, ante, 327.

COMPLAINT.

1. The two causes of action, adultery and cruelty, cannot be united in the same complaint. (*Buchholz* agt. *Buchholz*, ante, 46.)

2. A plaintiff must state his interest or title, even in a suit upon an instrument for the payment of the money only, and such other extrinsic facts as are necessary to enable him to recover. (*Ross* agt. *Meyer*, ante, 274.)

3. A mortgage is not an instrument for the payment of money only. (*Id.*)

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4. Where in an action to foreclose a mortgage, the allegation of the complaint is that the plaintiff is, by several assignments, which shall more fully and at large appear, reference being had thereto, now the lawful holder and owner of the bond and mortgage above mentioned and described, and is justly entitled to be paid the said principal sum above mentioned, together with the interest on that principal sum from the time above mentioned:

Held, that the complaint is defective; it does not show by whom the assignments were obtained, nor is the defendant apprised of the facts upon which the plaintiff relies to show that he is the owner and holder of the instrument in question. (*Id.*)

5. A demurrer to a complaint will be overruled when the alleged defect is, at the most, clearly a technical one or a clerical error. (*McCarron* agt. *Cahill*, ante, 305.)

See REPLEVIN.

Gardner agt. *Scovill*, ante, 272.

CONSTABLE.

1. When a clear legal duty devolves upon an officer or upon a board of officers, which he or it refuses to discharge, a *mandamus* will lie to compel the performance of that which the law requires to be done. (*The People ex rel. Millspaugh* agt. *The Town Auditors of Shawangunk*, ante, 224.)
2. Although the rule of law is that generally the courts will not interfere by *mandamus*, when a party has an adequate remedy by action, it does not apply to a case in which when an officer refuses to discharge his duty by an appeal to some other officer the desired relief may be obtained, but to one in which a court is asked to interfere by *mandamus* when the party

has a complete remedy by action. (*Id.*)

3. The relator presented to the board of town auditors a bill for services as one of the constables of such town, which such board refused to consider or to allow in whole or in part. The bill was made out in detail and verified substantially as prescribed in section 70 of 1 Revised Statutes (6th ed.), page 845. It is objected that the bill was not properly verified because the verification did not conform to section 2 of chapter 820 of Laws of 1869:

Held, first. That the section referred to only applies to a bill in which the officer claims "the increase or additional travel fees provided for in this act," that is to say, those which said act allows. If the section referred to was in force it would justify the board in rejecting any charge for "additional travel fees," but it would not justify the refusal to consider the bill and to audit so much of it as was proper to be audited.

Second. That section is no longer in force, and as the relators did not apply for any allowance or audit under the act of 1869, the provision in such act relating to proof of services claimed under it is not now applicable. (*Id.*)

4. Where, at the annual town meeting of 1849, the electors of the town determined that four constables should be elected that year, and in 1850 it was again "Resolved. That there shall be four constables elected." No resolution having been since passed on the subject:

Held, that the resolution could only be operative for one year; and as by 1 Revised Statutes (6th ed.), 823, section 8, the general number of constables of a town is five, and at the town meeting held in 1884 the electors having chosen only four constables, the three justices of the peace properly appointed the relator and he

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became a legal officer of the town.
(*Id.*)

CONTEMPT.

1. Upon a motion to punish the defendant, the mayor of the city of New York, for contempt in disobeying an order of injunction restraining him from appointing to, or nominating for, the office of commissioner of public works, or the office of counsel to the corporation, any person until the further order of this court. After adopting the conclusions reached by judge TRUAX on the dissolution of this injunction (*see ante*, 205):

Held, first, that the decision of judge TRUAX is no bar to the present application. During the existence of the injunction the defendant was bound to obey it, unless it was not merely voidable but absolutely void, for the reason that it was made without any jurisdiction whatever.

Second. A party will be in contempt for breach of an injunction, if the officer allowing it had jurisdiction, notwithstanding that it was erroneously granted, and for an insufficient cause.

Third. A judge of the court of common pleas is a county judge within the meaning of section 606 of the Code of Civil Procedure, and under section 773 an order may be granted by a judge of the court out of court; it may be made by any justice of the supreme court, or by any judge of the superior court in the county wherein his court is located, or by the county judge of the county where the action is triable, or in which the attorney for the applicant resides.

Fourth. Section 1809 of the Code of Civil Procedure does not apply to the corporation of the city of New York, nor to any officer thereof.

Fifth. While in a case falling within section 603 of the Code of Civil Procedure, which applies

to this case, the court or judge as a matter of orderly practice should insist upon the presentation of a formal complaint at the time of the application for an injunction, a failure to do so on granting the injunction, though it may constitute ground for a subsequent motion to vacate, is not a jurisdictional defect which renders the injunction *ipso facto* void.

Sixth. While the judge had the power to vacate the order of injunction for the reason that the proper practice had not been observed by the plaintiffs in the procurement of it, the judge was not without jurisdiction in granting it.

Seventh. In every aspect of this case the judge had sufficient jurisdiction to grant an order of injunction in it, and consequently the injunction he granted was valid in law as long as it remained in force and the defendant had no right to disobey it.

Eighth. The defendant failed to establish any excuse of which the law can take cognizance, and is guilty of a willful disobedience to the lawful mandate of this court in deliberately violating the order of injunction served upon him, and is guilty of a criminal contempt of this court.

Ninth. Because the defendant acted by advice of counsel is not a legal reason why he should not be punished, but is only an extenuating circumstance to be considered in meting out punishment (*Roosevelt* agt. *Edson*, *ante*, 231.)

2. Failure to pay alimony — commitment for contempt — form of the order — Code of Civil Procedure, secs. 1773, 1778 — inability to pay no excuse if caused by the voluntary act of the party — Code of Civil Procedure, sec. 2336. (*See Ryer* agt. *Ryer*, 83 *Hun*, 116.)
3. Contempt of court, by the violation of an injunction — the expenses of the proceedings to pun-

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- ish the guilty party may be included in the fine—Code of Civil Procedure, sec. 2284. (*See Brett agt. Brett*, 33 Hun, 547.)
4. The failure of an executor to pay over money as required by the terms of a decree, is punishable as a contempt—Code of Civil Procedure, secs. 2552, 2555. (*Matter of Snyder*, 84 Hun, 802.)
 5. An order requiring a person to show cause why he should not be punished, made by a county judge whose term expires before the return day, may be heard before his successor—Code of Civil Procedure, secs. 52, 2457, 2462. (*See Gammon agt. Berry*, 84 Hun, 138.)
 6. Power of a court of equity to strike out the defense of a party disobeying its orders—Code of Civil Procedure, sec. 1778—effect of. (*See Brisbane agt. Brisbane*, 84 Hun, 839.)
 7. Judgment for alimony—if the defendant fails to pay it he may be punished for a contempt—Code of Civil Procedure, secs. 1772, 1773, 2286. (*See Ryckman agt. Ryckman*, 84 Hun, 235.)
 2. The defendant who acts as trustee although he may not be legally elected or be a stockholder, is liable as to creditors for failure to file an annual report extending *Easterly agt. Barber* (65 N. Y., 252), which held that a trustee under such circumstances was liable to a co-trustee for contribution. (*Id.*)
 3. It is immaterial if the defendant so act whether he is legally elected or whether he is a stockholder at all. (*Id.*)
 4. Although the by-laws prohibited the officer of the corporation from contracting a debt, yet the fact that the company received and accepted the benefits of the contract, estops the defendant from raising the defense. (*Id.*)
 5. In an action against trustees of a corporation, where a suit is brought against three trustees, and the action is brought to trial against two and two are served, the defendants and the plaintiffs stand in the same relation as if only two had been named in the summons and complaint. (*Geisenheimer agt. Dodge*, ante, 264.)
 6. Under the provisions of section 456 of the Code of Civil Procedure, in actions where the complaint alleges the defendants to be severally liable, part may be proceeded against and the rest left out. An action under chapter 510 of the Laws of 1875, with an allegation in the complaint demanding a several judgment, is an action where the parties are alleged to be severally liable. (*Id.*)
 7. Although a defendant may be excused from answering questions under the provisions of section 887 of the Code of Civil Procedure, as to penalties, still this action is not such a penalty as will excuse the defendant from answering questions which would tend to expose

CORPORATIONS.

1. Actions against trustees to recover corporate debts as penalty for failure to file annual reports, pursuant to chapter 510 of the Laws of 1875, are not excluded by nor included in section 456 of the Code of Civil Procedure. In such actions one, any number, or all of the trustees may be made parties, and it is no defense that one trustee has not been joined, affirming *Strong agt. Sproul* (4 Daly, 328), reversed on another point (53 N. Y., 497), explaining *Quigley agt. Walter* (32 N. Y. Supr. Ct., 175). (*Halstead agt. Dodge*, ante, 170.)

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him to a verdict under chapter 510 of the Laws of 1875. (*Id.*)

8. The by-laws of a corporation containing restrictions and limitations upon powers of the officers are competent evidence as to the authority of the officers. (*De Bost agt. Albert Palmer Co., ante, 501.*)

9. Persons dealing with a corporation are required to take notice of the limitations imposed in the by-laws upon the authority of an officer or agent (*Citing Adriance agt. Rome, 52 Barb., 399; Dabney agt. Stephen, 10 Abb., 39; Alexander agt. Curdwell, 83 N. Y., 480; disapproving Marowitz on Corporations, sec. 64.*) (*Id.*)

10. A refusal of the court to pass upon a question of law requested by a counsel to be charged is an error for which the judgment should be reversed. (*Id.*)

11. This is so even though the requests be unreasonable in number. (*Id.*)

COSTS.

1. Mere presence in the state during business hours does not constitute residence, so as to relieve an attorney from his liability for costs, under section 3278 of the Code of Civil Procedure. (*Krom agt. Kurbheadt, ante, 38.*)

2. It is no answer under this section that the attorney commenced the action in good faith and in the belief that the plaintiff and his family were domiciled in New York. (*Id.*)

3. Nor does the omission of the defendant to demand security for costs during the pendency of the action affect the attorney's liability. (*Id.*)

4. The stay of proceedings for the non-payment of costs, provided for in section 779 of the Code of

Civil Procedure, does not operate to stay proceedings until default in payment; and such default does not exist until the expiration of ten days from the service of the order, or the time fixed in the order. (*Pettibone agt. Drakeford, ante, 141.*)

5. Where an official assignee of a debtor sues upon a cause of action arising "before the assignment," he may be required by the defendant as of right to give security for costs. (*Welch agt. Gaffney, ante, 146.*)

6. Where an action is brought in the city court of New York, and the plaintiff fails to recover over fifty dollars by reason of the allowance of a counter-claim pleaded and growing out of the same transaction alleged in the complaint, the defendant is entitled to costs. (*Gregory agt. McArdle et al., ante, 187.*)

7. Upon a motion for a new trial, made at special term upon a case, the appellant is entitled to costs, twenty dollars before argument, and forty dollars for argument where an appeal is taken from an order denying said motion, as well as from the judgment entered in the action under subdivision 3 of section 3251 of the Code of Civil Procedure. Subdivision 3 of section 3239 does not prevent the allowance of such costs. (*Pilgrim agt. Donnelly, ante, 281.*)

See EXTRA ALLOWANCE.

Bord agt. N. Y. C. and H. R. R. Co., ante, 1.

8. No trial fee allowed where the action is discontinued before a trial is actually had—Code of Civil Procedure, sec. 3251, sub. 3. (*Studwell agt. Baxter, 33 Hun, 331.*)

9. Contempt of court by the violation of an injunction—the expenses of the proceedings to punish the guilty party may be in-

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- cluded in the fine — Code of Civil Procedure, sec. 2284. (*See Brett agt. Brett*, 38 Hun, 547.)
10. Construction of a will — costs of the action — upon what funds they should be charged. (*See Cook agt. Munn*, 38 Hun, 25.)
 11. Appeal — none lies to a court of sessions from a judgment of the special sessions charging a prosecutor with costs — Code of Criminal Procedure, secs. 719, 720, 749 — Code of Civil Procedure, secs. 3044, 3015. (*See People agt. Norton*, 38 Hun, 277.)
 12. The plaintiff is entitled thereto, in an action for a violation of chapter 287 of 1878, although the recovery is less than fifty dollars — Code of Civil Procedure, sec. 3250. (*Furman agt. Cunningham*, 34 Hun, 606.)
 13. When to be allowed, as of course, to a successful appellant, on appeal from a judgment of disposition in summary proceedings — Code of Civil Procedure, secs. 2260, 3066, 3240. (*Harrison agt. Swart*, 34 Hun, 259.)
 14. An application for an order requiring the receiver of an insolvent bank to pay over a trust fund in its hands, is not a motion as defined by the Code of Civil Procedure (sec. 768), but a special proceeding "for the enforcement or protection of a right" (sec. 3334) in which costs may be awarded in the discretion of the court as in an action. (*People agt. City Bank of Rochester*, 96 N. Y., 32.)
 15. An order of general term reversing, with costs, an order denying a motion to punish a defendant for alleged contempt in violating an injunction, and remitting the matter to the court below to proceed against defendant, is not reviewable here, even so far as it awards costs. (*Crosby agt. Stephan*, 97 N. Y., 606.)
 16. Where costs are awarded by an order, and depend upon the conclusion reached upon the merits of the motion, and this court has no jurisdiction to review the subject-matter of the order, it may not review the question as to the propriety of the award of costs. (*Id.*)
 17. The rule that questions of cost in legal actions and proceedings are reviewable here whenever legitimately before the court, unless the allowance was discretionary, does not apply, when, in order to determine whether costs were properly allowed or not, it is necessary to review matters over which the court has no jurisdiction. (*Id.*)
 18. In any event to entitle a party to review the portion of an order awarding costs, the notice of appeal should state specifically that it is from such part of the order. (*Id.*)
 19. Where plaintiff was unsuccessful on appeal in equity action, and was properly chargeable with costs, and some of the defendants also failed on appeal as against a co-defendant, ordered that plaintiff pay costs directly to successful defendant. (*See M. and T. Nat. Bank agt. Mayor, &c.*, 97 N. Y., 355.)

COUNTY COURT.

1. Under section 341 of the Code of Civil Procedure the county Court has no jurisdiction in an action against a domestic railroad corporation, unless its principal office is located within the county, or the summons is served in the county in which the action is brought and in which some of its business is transacted. (*Heenan agt. New York, West Shore and Buffalo Railway Company, ante*, 53.)
2. In an action against a railway corporation an allegation in the complaint that a part of the line

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of the road is run and operated within the county is sufficient as to residence. (*Id.*)

8. Except where a demurrer may be interposed, any jurisdictional question may be raised by the answer, and a general appearance with such an answer is no waiver of the objection. (*Id.*)

COUNTY JUDGE.

1. Contempt — an order requiring a person to show cause why he should not be punished, made by a county judge whose term expires before the return day, may be heard by his successor—Code of Civil Procedure, secs. 52, 2457, 2461. (*See Gammon agt. Berry, 84 Hun, 188.*)

COURT OF COMMON PLEAS.

1. An appeal to the general term of the court of common pleas, in and for the city and county of New York, from an order of the general term of the marine court of that city, granting a new trial, is allowed only upon condition that the appellant consent to a final judgment against him if the order is affirmed (*Sec. 9, chap. 545, Laws of 1874*). Without such a consent, therefore, there can be no appeal and no final judgment entered upon it. (*Wilmore agt. Flack, 96 N. Y., 512.*)
2. Accordingly *held*, where a notice of appeal contained no such consent, that an order of the common pleas affirming an order of the marine court granting a new trial was without jurisdiction and void, as was also a judgment absolute entered in the latter court upon the remittitur; such judgment being simply that of the appellate court (*sec. 43, chap. 479, Laws of 1875*; that conceding where the

consent had been omitted by mistake, and the appellant in fact consented, the notice might be amended by inserting the consent *nunc pro tunc*, this could not be done where the consent was intentionally omitted, has never been given, and has been persistently refused by the appellant; that jurisdiction could not be acquired by an amendment which falsifies the facts, and the option given to the party could not be taken away under the guise of correcting a mistake or oversight; also that the acquiescence of the appellant in the exercise of jurisdiction by said appellate court without the consent did not give jurisdiction, and did not estop him from raising the question. (*Id.*)

COURT OF SESSIONS.

1. The court of sessions has the power to suspend sentence after conviction and may at any time afterwards pronounce sentence upon same conviction. (*The People agt. Harrington, ante, 35.*)
2. But if the rights or *status* of the prisoner change, as where when he is convicted he is under sixteen years of age and may be sentenced to the House of Refuge, which would not disfranchise him, after he passes that age he cannot be sentenced upon such conviction. (*Id.*)

CRIMINAL TRIAL.

1. A copy of the evidence before the grand jury upon which indictments were found should be furnished the accused when necessity therefor is shown to enable him to prepare for trial, and the matter is one resting in the discretion of the court. (*The People agt. Bellows, ante, 149.*)
2. Where the statements in an indictment are sufficiently definite

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to advise defendant of the charge against him he is not entitled to any further particulars. (*Id.*)

3. Where the counts for an offense such as grand larceny are so general and embrace so many subjects of larceny that they do not advise the defendant with sufficient distinctness of the charge in each against him, the sums stolen, upon the proof of which the people rely, should be particularly stated so that defendant may be advised of the precise charges under the counts relating to the crime, and thus be enabled to prepare to meet them. (*Id.*)
4. Upon the arraignment of a prisoner without counsel the law (*Code of Crim. Pro., sec. 308*) requires that "he must be asked if he desire the aid of counsel, and if he does the court must assign counsel." The duty of assigning counsel carries with it the power, and the further duty to do whatever is necessary and proper to be done to enable the assigned counsel to discharge the trust which the court has devolved upon him. (*The People agt. Willett, ante, 196.*)
5. Where a prisoner is entirely unable to furnish the money to defray the cost of transcribing the stenographers' notes, and counsel who have been assigned for his defenses deposes that a proper discharge of the duties devolved upon him by the court requires a presentation of the case to the appellate tribunal, the court should provide the means necessary to enable him to do that which the court has enjoined. (*Id.*)
6. And in a proper case the court will upon motion in behalf of the prisoner direct that a copy of the stenographer's notes of the trial be furnished his counsel at the expense of the county. (*Id.*)
7. The defendant was convicted of having taken a female under the age of sixteen years for the purposes of prostitution. The indictment charged the taking for purposes of prostitution. The evidence to support the indictment was that of the mother of the child as to her age; the evidence of the girl herself, also of a female physician as to the physical condition of the girl, and the evidence of two officers of the Society for the Prevention of Cruelty to Children as to the character of the place kept by the defendant and as to an interview with the defendant. On a motion for a stay pending appeal, after reviewing the evidence:
Held, that although it may be true an appellate court may order a new trial if it be satisfied that the verdict against the prisoner was against the weight of evidence, or against the law, or that justice requires a new trial, whether any exceptions shall have been taken or not in the court below, in this case the verdict does not seem to be against the weight of evidence, or against the law, or that justice requires a new trial. (*The People agt. Platt, ante, 402.*)
8. The evidence of what the officers saw on the twenty-ninth of August was competent, because the girl was there then, and the character of the place in which the girl was then being kept was material to show the object of the keeping. (*Id.*)
9. The character of the house being material, it having been shown what it was while the girl was there, it was competent to prove what it had been both before and after within reasonable limits, and that it was kept by the same proprietor and used for the same purposes so as to show the character of the place. (*Id.*)
10. Both the mother and girl testified as to her age, and the statute allows the jury to consider her appearance in connection with the

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other evidence in determining the question of age. (*Id.*)

11. It is not necessary to constitute the taking of the girl by the defendant that it was accompanied by force and violence. If the girl went to the defendant's place voluntarily, and he invited her in, and allowed her to remain there, and used her for purposes of prostitution, it would be a taking within the meaning of the statute. (*Id.*)

12. What is required by section 288 of the Penal Code, as to corroborative testimony, is that there should be some fact deposed independently altogether of the evidence of the accomplice, which, taken by itself, leads to the inference not only that a crime had been committed, but that the prisoner is implicated in it. (*Id.*)

13. The false denials of the defendant are strong corroborations of a criminal intent upon the part of the defendant in the keeping of the girl. The evidence of the officers show that the girl was at the defendant's place with his knowledge, and that it was a house of prostitution, and from these facts the jury might well infer entirely, independent of the girl's testimony, that the defendant was keeping her there for the purposes of prostitution. The evidence of the mother and the officers then showed, independent of that of the girl herself, she was under sixteen years of age, and was being kept by the defendant for purposes of prostitution. This was evidence of material facts leading to the inference not only that a crime had been committed, but that the defendant was implicated in it. (*Id.*)

DEED.

See FRAUD.
Smith agt. Duffy, ante, 340.

DEMURRER.

1. The plaintiff as administrator of a next of kin sued defendant for an accounting of an estate he was administrator of in Germany, the assets of which it was alleged he had brought into this state and converted to his own use:

Held, on demurrer, that the plaintiff possessed a good cause of action. (*Marshall agt. Brecker, ante, 217.*)

2. By a clerical error the date of plaintiff's appointment as administrator was written in the copy of the complaint served on the defendant 1873 (which was before the intestate's death) instead of 1883 as it appeared in the original; and the plaintiff in the caption styled himself "administrator" in place of "as administrator," and omitted in the body of his complaint to state expressly that he sued in his representative capacity:

Held, that a demurrer to his legal capacity to sue was not tenable. (*Id.*)

3. A demurrer to a complaint will be overruled when the alleged defect is, at the most, clearly a technical one or a clerical error. (*McCarron agt. Cahill, ante, 305.*)

DENIAL.

1. A denial in an answer of each and every allegation not hereinafter specifically admitted, controverted or denied is insufficient. (*Spiegel et al. agt. Thompson, ante, 129.*)

DISTRICT COURTS.

1. The proceedings in a district court incident to the application for the granting and the execution of the warrant of attachment, and the duties of the justice and the clerk with respect to those pro-

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ceedings, are now the same as are prescribed by the district court act; but if we wish to ascertain when and for what causes an attachment may be granted, for what reason it may be dissolved, and what effect upon the action will be produced by the vacating of the attachment, we must look to article 4 of the Code of Civil Procedure. (*Rosenthal* agt. *Grouse*, ante, 447.)

2. By section 2917 of the Code of Civil Procedure the attachment is now only a provisional remedy, and an error of the justice in regard to such a remedy will not cause the reversal of the judgment if the action were properly decided upon its merits. (*Id.*)
3. At present there is no remedy for a party aggrieved if a district court errs in upholding or in vacating a provisional remedy. The decision of the justice cannot be reviewed on appeal (*This is adverse to Lang* agt. *Marke*, 65 *How.*, 127). (*Id.*)
4. The provisions of section 8210 and of 8211 of the Code of Civil Procedure in relation to provisional remedies in the district civil courts are in conflict. (*Id.*)

DOWER.

See WILL.

White agt. *Kane*, ante, 382.

EVIDENCE.

1. Evidence taken in writing, subscribed and sworn to by the witness, that a certain female child "actually and apparently under the age of fourteen years, to wit, aged twelve years, was found begging, receiving and soliciting alms" in a specified street, established all that was required to justify the commitment. (*People ex rel. Perkeraoen* agt. *The Sisters*

of the Order of St. Dominick, ante, 182.)

See CRIMINAL TRIAL.

The People agt. *Platt*, ante, 402.

2. Examination of a party before trial — it may be granted in an action to recover property fraudulently obtained — Code of Civil Procedure, sec. 870. (*Davenport Glucose Mfg. Co.* agt. *Tausig*, 33 *Hun*, 32.)
3. Examination of a party before trial — what constitutes a waiver of the certification and filing of the deposition. (*Mayer* agt. *Ehrlich*, 33 *Hun*, 1.)
4. Presumption — a check is presumed to be given in payment of a debt due. (*Poucher* agt. *Scott*, 33 *Hun*, 223.)
5. When inadmissible as being too remote. (*Id.*)
6. When an administrator is debarred from testifying by section 829 of the Code of Civil Procedure. (*Id.*)
7. What testimony of a party is inadmissible as relating to a personal transaction with a deceased person — Code of Civil Procedure, sec. 829. (*Price* agt. *Price*, 33 *Hun*, 69.)
8. A judgment creditor does not claim or hold an interest under the debtor, within the meaning of section 829 of the Code of Civil Procedure. (*Gillies* agt. *Kreuder*, 33 *Hun*, 814.)
9. Testimony as to a personal transaction with a deceased person — Code of Civil Procedure, sec. 829. (*Kelly* agt. *Burroughs*, 33 *Hun*, 349.)
10. When the declaration of a third person is admissible as against one accused of a crime. (*People* agt. *Burns*, 33 *Hun*, 296.)

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11. Witness — his credibility may be impeached by proof of conviction of any crime. (*Id.*)
12. Lost will — application for its probate — what proof of its due execution by the testator must be given by the proponent. (*See Matter of Russell*, 33 Hun, 271.)
13. Private way in a village — when it will become a highway by long use as such — what evidence will justify a finding of a dedication of a way to, and an acceptance of it by the public. (*See Porter agt. Village of Attica*, 33 Hun, 605.)
14. A witness cannot testify as to "his impression" of what was said. (*See Matter of N. Y., W. S. and B. R. R. Co.*, 33 Hun, 231.)
15. Contributory negligence — duty of a person approaching a railroad track with a team — proof of the ringing of a bell required by section 61, 2 Revised Statutes (6th ed.), 542 — the presumption is that the statute has been complied with. (*See Thompson agt. N. Y. C. and H. R. R. Co.*, 33 Hun, 16.)
16. A party cannot impeach his own witness by proving contradictory statements made by him. (*See Tice agt. Drumgoole*, 33 Hun, 365.)
17. A party voluntarily withholding evidence will not be granted a new trial, in order to enable him to introduce it. (*See Price agt. Price*, 33 Hun, 432.)
18. Foreign judgment — when a decree recovered in foreign liquidation proceedings cannot be enforced here against a resident of this state — what must be shown to sustain an action upon a foreign judgment. (*See Anderson agt. Haddon*, 33 Hun, 435.)
19. When the deposition of a witness taken out of the State may be read, although the witness be in court — the deposition can only be suppressed by a special motion — Code of Civil Procedure, sec. 910. (*See Hedges agt. Williams*, 33 Hun, 546.)
20. Proofs of death furnished to an insurance company are admissible in its favor upon the trial of an action upon the policy — when the parties claiming under the policy must prove the cause of death. (*See Goldschmidt agt. Mut. Life Ins. Co.*, 33 Hun, 441.)
21. Murder in the first degree — Penal Code, sec. 183, sub. 1 — what evidence of premeditation and deliberation must be given to authorize a submission of that question to the jury. (*See People agt. Conroy*, 33 Hun, 119.)
22. Perjury — requisites of the indictment — it need not specify in detail the issues in the action in which the false testimony was given — the testimony is material if it relates to one of several facts constituting the issue involved — what evidence in corroboration of the testimony of the impeaching witness is required. (*See People agt. Grimshaw*, 33 Hun, 505.)
23. Possession of personal property — how far evidence of title thereto. (*See Smith agt. Clews*, 33 Hun, 501.)
24. One tried for practicing medicine without a license must prove that he has it. (*People agt. Nyce*, 34 Hun, 298.)
25. The authority of the institution to issue a diploma must be proved by the party claiming under it. (*Id.*)
26. Unconstitutionality of a law of another state — it is not conclusively established by reading a case from the reports of that state holding it to be unconstitutional. (*Id.*)

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27. When admissible as tending to corroborate other testimony. (*People* agt. *Vedder*, 84 Hun, 280.)
28. "Accomplices" — meaning of, as used in section 899 of the Code of Criminal Procedure. (*Id.*)
29. When the declarations of a party are inadmissible as against his assignee for the benefit of creditors. (*Videard* agt. *Powers*, 84 Hun, 221.)
30. When the records of a corporation are inadmissible in its favor as against strangers. (*Grayville* agt. *N. Y. C. and H. R. R. Co.*, 84 Hun, 224.)
31. When a verbal agreement is not merged in a written contract subsequently executed. (*Riley* agt. *N. Y., L. E. and W. R. R. Co.*, 84 Hun, 97.)
32. When the drinking of liquor in a store raises a presumption that it was sold, to be drunk there. (*Comrs. of Excise of Auburn* agt. *Merchant*, 84 Hun, 19.)
33. In civil actions for penalties — the act of an agent is *prima facie* that of the principal. (*Amerman* agt. *Kall*, 84 Hun, 126.)
34. As to whether this rule holds in criminal cases. (*Id.*)
35. Action to recover a penalty under the excise law — what evidence shows the liquor sold to be intoxicating. (*See Ripley* agt. *McCann*, 84 Hun, 112.)
36. Civil damage act — 1878, chap. 646 — has no extra territorial effect — a foreign law must be proved to exist. (*See Goodwin* agt. *Young*, 84 Hun, 252.)
37. Obstructions in a street — suspension of a banner across a street — liability of a village to one who is injured by his horse taking fright at it, and running away — when it may be shown that similar banners have frightened other horses. (*See Champlin* agt. *Village of Penn Yan*, 84 Hun, 88.)
38. Reformation of a written contract — the evidence of a mistake must be clear and unquestionable. (*See Bartholomew* agt. *Mercantile Ins. Co.*, 84 Hun, 263.)
39. Stipulation that testimony taken in another action may be read — construction of it — the answer of a witness to a question as to his motive in testifying, may be contradicted by further proof offered by the party asking the question. (*See Burgess* agt. *N. Y. C. and H. R. R. Co.*, 84 Hun, 283.)
40. Conversion — what possession is sufficient to maintain an action for the conversion of personal property. (*See Lyon* agt. *Sellew*, 84 Hun, 124.)
41. Promissory note — validity of one given by a husband to his wife — when the testimony of a party is inadmissible under Code of Civil Procedure, sec. 829. (*See Benedict* agt. *Driggs*, 84 Hun, 94.)
42. Opinion of a witness, when it is admissible — the grounds of an objection to its competency must be specifically stated. (*See Amadon* agt. *Ingersoll*, 84 Hun, 139.)
43. Negligence — action for personal injuries occasioned by it — the pain suffered by the plaintiff may be considered by the jury — when a verdict will not be set aside as excessive. (*See Quinn* agt. *Long Island R. R. Co.*, 84 Hun, 881.)
44. Fraudulent conveyance of a boat — when a diligent effort to take possession, is sufficient to preserve the rights of the transferee — damages for the conversion of a canal boat — opinions of witnesses as to its value at different ports — what offer the owner was

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willing to accept cannot be shown. (See *Keller* agt. *Paine*, 34 *Hun*, 167.)

45. Action to charge trustees of a manufacturing corporation with its debts—the trustees are not bound by a judgment recovered against the company. (See *Kraft* agt. *Coykendall*, 34 *Hun*, 285.)

46. *Habeas corpus*—the sufficiency of the evidence upon which the relator was committed cannot be examined into—what evidence justifies the commitment of a child as a vagrant—Penal Code, sec. 291. (See *People ex rel. Perkerson* agt. *St. Dominick*, 34 *Hun*, 468.)

EXAMINATION OF PARTIES BEFORE TRIAL.

1. An examination of a plaintiff, will not be allowed, for the purpose of discovering what consideration the plaintiff paid for the note sued on, and which was misappropriated by the party to whom it had been intrusted to procure its discount and return the proceeds to the makers. (*Frazier et al.* agt. *David et al.*, *ante*, 490.)
2. An examination will not be allowed in a case where a bill of discovery could not be maintained. (*Id.*)
3. Where the object for which the examination is sought by the petitioner, is for the purpose of discovering whether the plaintiffs can maintain their cause of action, the nature and number of their witnesses, or of determining whether the plaintiffs have title to the note, or else to anticipate perjury, the application will be denied. (*Id.*)
4. The affidavit required to procure an order for the examination of a party before trial should state the nature of the action, and the sub-

stance of the cause of action, and of the judgment demanded therein. An affidavit which does not truly contain these requirements is insufficient. (*Kaufman* agt. *Hersfeld*, *ante*, 444.)

5. Where the affidavit of the plaintiff only showed that he was ignorant as to whether he had a cause of action:

Held, that such want of knowledge on his part is no justification for the order. He should know before commencing his action the true cause thereof, and its substance should be set out. (*Id.*)

See PRACTICE.

Matter of Fisk, *ante*, 432.

EXCEPTIONS.

1. In an equity action, certain issues of fact were tried by a jury, and on the trial improper evidence was received, under objection and exception. The action was tried by a judge other than the one who presided on the jury trial. A case containing the evidence given on that trial was received in evidence without objection: *Held*, that the exceptions taken on the jury trial were not available on appeal from the judgment; that by omitting to raise the objection to the improper evidence or calling the attention of the court thereto, the objections and exceptions must be deemed to have been waived. (*Arnold* agt. *Parmelee*, 97 *N. Y.*, 652.)
2. Where exception insufficient to raise question on appeal. (See *Hepburn* agt. *Montgomery* [Mem.], 97 *N. Y.*, 617.)

EXCISE LAW.

See OVERSEER OF THE POOR.

Horton agt. *Carrington*, *ante*, 124.

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EXECUTION.

1. It ceases to be operative after a sale has been made thereunder—the attorney issuing it cannot thereafter withdraw it. (*Thomas agt. Bogert*, 88 Hun, 11.)
2. Exemption of property from execution—the law of the forum and not that of the place of the defendant's residence controls—a non-resident cannot claim here the benefit of a foreign exemption law. (*Buchanan agt. Hunt*, 88 Hun, 829.)
3. Docketing of decrees of a surrogate—form of the execution to be issued upon them—Code of Civil Procedure, sec. 2554. (*See Bingham agt. Burlingame*, 88 Hun, 211.)
4. Chattel mortgage—failure to refile it within the proper time—the lien is restored by a subsequent reffiling. (*See Nixon agt. Stanley*, 88 Hun, 247.)
5. Execution issued upon a judgment void as to the debtor's creditors—how far it protects an officer in making a levy under it. (*Bodine agt. Thurnwachter*, 84 Hun, 6.)
6. Summary proceedings to recover land by a purchaser at a sale under execution—Code of Civil Procedure, sec. 2232—the validity of the judgment cannot be collaterally attacked therein. (*See Getting agt. Mohr*, 84 Hun, 340.)
7. Where a chattel has been replevied, it may not, while it is in the possession of the sheriff, or, *it seems*, while in the possession of the plaintiff, awaiting the result of the action, be levied upon by virtue of an execution against the defendant in said action. The judgment creditor can only claim through the title of his debtor, and the property having been lawfully removed from the possession

of the latter, and being held in the custody of the law for final adjudication he cannot disturb that custody, but is confined to such remedy as will not interfere with it. (*First Nat. Bk. agt. Dunn*, 97 N. Y., 149.)

8. *It seems*, that the execution creditor in such case may proceed in equity making all the rival claimants parties, and so determine in one action the whole controversy. (*Id.*)

EXECUTORS AND ADMINISTRATORS.

1. Commissions for the receiving and the paying out of moneys may justly be claimed by executors, guardians, trustees, &c., who have received and paid out assets never actually converted into money. (*In the Estate of Edwin D. Morgan, deceased, ante*, 182.)
2. An accounting executor, guardian, trustee, &c., may lawfully be granted commissions for receiving such property, even when the property so received remains in his hands precisely as it reached them. (*Id.*)
3. In computing commissions upon sureties which formed a part of an estate when it came into the hands of the executors—which have since been retained by them in the exercise of the discretionary authority given them by the testator's will, and which they are about to pass over to the trustees; the market value of such securities at the time they came into the hands of the executors must be taken as the basis for the one-half "receiving" commissions, and the one-half commissions for "paying out," must be computed upon the value of those securities at the time the decree shall be entered upon the accounting. (*Id.*)
4. An executor who is directed to sell real estate and invest the pro-

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ceeds is liable for damages to the aggrieved party, unless he performs his duty faithfully, although the time and manner of sale is left to his discretion. (*Haight* agt. *Briabin*, *ante*, 199.)

5. In such a case the surrogate has no jurisdiction in an action or special proceeding to recover such damages. (*Id.*)

6. Section 814 of the Code of Civil Procedure allows an action to be maintained in the name of the party interested against the sureties of such executors for such neglect of duty upon leave being granted by the supreme court. (*Id.*)

7. Proceedings before the surrogate have not been prescribed for such a breach of the bond. (*Id.*)

8. An administrator appointed in a foreign country upon coming into this state with assets may be required to account in his character of trustee, to one entitled to a distributive share, without taking out letters here. (*Marshall* agt. *Bresler*, *ante*, 217.)

9. The plaintiff as administrator of a next of kin sued defendant for an accounting of an estate he was administrator of in Germany, the assets of which it was alleged he had brought into this state and converted to his own use:

Held, on demurrer, that the plaintiff possessed a good cause of action. (*Id.*)

10. By a clerical error the date of plaintiff's appointment as administrator was written in the copy of the complaint served on the defendant 1878 (which was before the intestate's death) instead of 1883 as it appeared in the original; and the plaintiff in the caption styled himself "administrator" in place of "as administrator," and omitted in the body of his complaint to state expressly that he

sued in his representative capacity:

Held, that a demurrer to his legal capacity to sue was not tenable. (*Id.*)

11. In a proceeding by the receiver of taxes to enforce the payment of a tax of \$2,620, in the year 1881, on an assessment of \$100,000 legally imposed upon an administrator of a deceased person, the administrator set up that the deceased resided and died out of the state, but had some personal effects here when he died; that he had no notice of any tax upon the lists in this city, supposing the deceased could not be taxed in this state; that the inventory of the estate, filed in the surrogate's office in New York county, showed \$49,068.81 of assets after payment of debts upon which the tax legally chargeable would be \$1,310:

Held, that the tax having been imposed before the estate had been settled by the surrogate's decree, it was the duty of the respondent, before making the distribution under it, to ascertain what the liabilities under it were, whether for taxes or otherwise; that it was too late to question the quantum of tax, and that no case was shown for either legal or equitable interference (*Affirming S. C.*, 67 *How.*, 118). (*McMahon* agt. *Jones*, *ante*, 270.)

12. Commissions, at the rates fixed by the statute, are allowed only by an order of the court on the settlement of the executor's account, but the right to such commissions cannot be withheld by the court except in certain cases, as where specific compensation is provided. (*Matter of the Estate of William R. Welling*, deceased, *ante*, 327.)

13. Where, on January 14, 1834, letters testamentary were issued to three executors, and on July 15, 1834, one of such executors died, after having acted up to that time, the estate amounting to more than \$100,000:

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Held, that on the final accounting three full commissions should be allowed and apportioned among them, according to the services rendered by each executor. (*Id.*)

EXTRA ALLOWANCE.

1. In an action brought under section 1902 of the Code of Civil Procedure, by an administrator to recover compensation for the death of a son of the deceased father, in a difficult and extraordinary case, an extra allowance may be made, and should be computed not upon the amount of the verdict only, but upon such amount with interest added from the date of the death. (*Bord* agt. *N. Y. C. and H. R. R. Co.*, *ante*, 1.)
2. In actions of this character "the sum recovered" is not only the amount of the verdict, which represents only the judgment of the jury as to what would be a "fair and just compensation for the pecuniary injuries" to the plaintiff, but also the interest upon such amount from the date of the death. (*Id.*)
3. That such interest is required by express statutory enactment (*Code of Civil Procedure*, sec. 1904) to be added, does not make such addition anything other or different than a part of "the sum recovered." (*Id.*)

FALSE REPRESENTATIONS.

1. An action founded upon fraud and deceit of defendant cannot be maintained in the absence of proof that the defendant believed, or had reason to believe, at the time he made them, that the representations made by him were false, and for that reason fraudulently made, or unless it be shown that he assumed, or intended to convey the

impression, that he had actual knowledge of their truth, though conscious that he had no such knowledge. (*Doty* agt. *Campbell*, *ante*, 101.)

FEES.

See REFERENCES.

Little agt. *Lynch*, *ante*, 95.

FRAUD.

1. Although it is not enough to induce a court of equity to interfere to show that a bargain is hard and unreasonable, nor does mere inadequacy of consideration alone form a ground for equitable relief; yet there are cases where there is no positive evidence of fraud, in which the inequality of the bargain is so gross that the mind cannot resist the inference, that though there be no direct evidence of fraud, such a bargain must have been in some way improperly obtained. (*Smith* agt. *Duffy*, *ante*, 340.)
2. In such cases a court of equity will avoid a bargain, not merely on account of its gross inequality, but because that inequality furnishes the most vehement presumption of fraud. (*Id.*)

See ATTACHMENT.

Victor agt. *Henlein*, *ante*, 159.

GENERAL TERM.

1. Where, in answer to appeal from surrogate's decree, the respondent alleges errors in portions of the decree not appealed from, the general term has jurisdiction to review and to reverse those portions, a separate appeal is not necessary (*Code of Civil Procedure*, sec. 2587). (*See Freeman* agt. *Cott*, 96 *N. Y.*, 63.)

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GUARANTY.

1. The defendants, representing a corporation, recited in their prospectus that its whole capital stock had been issued to them in payment for certain property, and that they had made an agreement to place 9,000 shares of the stock in the hands of a trustee who had ordered the sale of 6,000 shares, which were offered at the minimum price of fifty dollars per share. The plaintiff, who subscribed for 600 shares, received a collateral guaranty from defendants that they would, at a future time, in case he was dissatisfied with his purchase, take the same off his hands. In this action to recover back the moneys paid upon the subscription:

Held, that each subscriber to a portion of the 6,000 shares had a right to require that each one of his co-subscribers should be a reliable subscriber, that is, an absolute subscriber, not possessing such a collateral agreement as that given to plaintiffs; and that the agreement in question not having been disclosed to all the parties subscribing for the stock, was illegal and cannot be enforced. (*Meyer agt. Blair, ante, 299.*)

HABEAS CORPUS.

1. A female child, under fourteen years, who was committed by a police magistrate for violation of section 297 of the Penal Code, to an institution authorized by law to receive and take charge of minors, was discharged on writs of *habeas corpus* and *certiorari* by the judge issuing the writs, though the commitment was not claimed to be either informal or defective:

Held, that the judge issuing the writs could not, by means of them, review the hearing had before the committing magistrate, and determine whether he had or had not acted upon sufficient evidence in making the order of commit-

ment. (*People ex rel. Perkerson agt. The Sisters of the Order of St. Dominick, ante, 132.*)

2. The sufficiency of the evidence upon which the relator was committed cannot be examined into. (*People ex rel. Perkerson agt. St. Dominick, 34 Hun, 463.*)
3. What evidence justifies the commitment of a child as a vagrant—Penal Code, sec. 291. (*Id.*)
4. What questions may be examined upon the return—questions settled by a court-martial cannot be re-examined. (*People ex rel. Frey agt. Warden N. Y. Co. Jail, 84 Hun, 393.*)
5. An order directing a further return to a writ of *habeas corpus* or *certiorari*, issued under the Code of Civil Procedure (*secs. 2015 et seq.*), to inquire into the cause of detention of a person, is not appealable (*sec. 2058*); and the general term of the supreme court has no authority to review it. (*In re Larson, 96 N. Y., 381.*)

HIGHWAYS.

1. Where a person has seized animals under the highway act (*Laws of 1867, chap. 814*), and instituted proceedings under the statute before a justice, the owner cannot maintain an action of replevin to recover their possession, and if he does, the defendant may show what was litigated before the justice to establish his right to seize and hold the animals as a bar to the action to recover the possession of them. (*Cropper agt. Perry, ante, 40.*)
2. In proceedings under chapter 19, title 10 of the Code of Civil Procedure, relating to an animal straying upon the highway, where the person to whom the precept was directed by name is personally served or appears and answers, the

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theory of the statute is to give him damages, where he succeeds upon the trial of the issue *only* when the seizure is found to be malicious and without probable cause, and only then in the special proceeding where the issue is decided in his favor. All the issues are to be determined in one special proceeding, and not a part tried in a special proceeding and a part in an action. (*Millard agt. Severance, ante*, 521.)

8. Where, as in this case, the precept was directed to the plaintiff in this action by his name and he was personally served, and he appeared and answered, unless the justice found that the seizure was malicious and without probable cause, he was not entitled to recover any damages under the statute, as section 8108 expressly excludes him from maintaining such an action. (*Id.*)

HUSBAND AND WIFE.

1. Husband and wife have the capacity to enter into a contract of copartnership for the purpose of carrying on a trade or business, and contracts made by such a firm are enforceable against the wife's estate. This is adverse to *Huirlee agt. Bloomingdale* (87 *How.*, 292). (*Graff agt. Kinney, ante*, 59.)

INDICTMENT.

1. It was not intended by the provision of the Code of Criminal Procedure (*sec.* 273), abolishing existing forms of pleading in criminal actions, to set aside the judicial construction theretofore given to the language usually employed in such pleadings; its true office is to abrogate the technical rules formerly governing such pleadings, and to substitute simpler forms and a more liberal interpretation. (*People agt. Conroy*, 97 *N. Y.*, 62.)

2. In an indictment under said Code for murder in the first degree it is not necessary that the particular intent with which the homicide was committed shall be set forth; it is sufficient to allege that it was done feloniously, with malice aforethought, and contrary to the form of the statute (*Code of Crim. Pro., secs.* 275, 284). (*Id.*)

3. The question as to whether the crime was committed under such circumstances, with reference to intent, as to make it murder in the first degree within the statutory definition (*Penal Code, sec.* 183), is one of fact, determinable by the jury. (*Id.*)

4. *It seems* that it is the better form of pleading to charge the crime to have been committed with one of the several intents described in said Penal Code. (*Id.*)

5. The objection that an indictment does not conform to the requirements of the Code of Criminal Procedure (*secs.* 275, 276) may only be taken by demurrer (*Secs.* 321, 323). (*Id.*)

6. The common-law remedy by indictment against a person keeping a bawdy-house was not abolished or superseded by the provision of the Code of Criminal Procedure as to disorderly persons (*Sec.* 899). (*People ex rel. agt. Sadler*, 97 *N. Y.*, 146.)

INJUNCTION.

1. In an action in the nature of a *quo warranto*, an injunction will never be issued in this state *pendente lite* restraining the party in possession of the office from exercising the functions thereof. (*The People ex rel. Demarest et al. agt. Farley et al., ante*, 71.)
2. A court of equity can restrain public bodies and public officers from making a corrupt appoint-

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ment to an office to the prejudice of the public, and so to do is not controlling the discretion of a legislative body. (*Roosevelt and others agt. The Mayor of New York and others, ante, 205.*)

3. The power of appointing and confirming a commissioner of public works and corporation counsel of the city of New York is a trust conferred on the mayor and board of aldermen, and the method of exercising this trust is subject to the control of the courts, which will interfere on sufficient allegations that such trust is about to be used corruptly or influenced by bribery, though the appointment might be legal, yet, if tainted by a charge of corruption or bribery, the court will have a right to interfere on that ground and restrain a breach of trust by injunction. (*Id.*)
4. An injunction should not be granted on affidavits alone, and without a complaint. (*Id.*)
5. In an action brought by the proper party, in which action sufficient facts are properly alleged, an injunction restraining an illegal or corrupt appointment to a public office may be issued. (*Id.*)
6. Where as in this case the allegations that the mayor and aldermen were about to act corruptly were made on information and belief, the affiant not giving the sources of his information nor the grounds of his belief, and not stating who the persons were who were to be corruptly appointed and confirmed, but referring to them by the vague appellation of "certain persons:"
Held, that the allegations were too indefinite and uncertain to sustain an injunction. The mere allegation that there is a corrupt bargain and conspiracy, unless sustained by other facts, amounts to nothing, and is only a conclusion. (*Id.*)
7. In March, 1876, the plaintiff herein was the owner of a large number of bonds of the Pacific Railroad of Missouri, purporting to be secured by a mortgage known as the third mortgage upon the property of said railroad. At this time an action in which one George E. Ketchum was plaintiff, was pending in the United States circuit court for the eastern district of Missouri to foreclose this third mortgage. Certain stockholders intervened in said foreclosure suit, and filed an answer and cross-bill alleging collusion and fraud on the part of the directors and managers of said Pacific railroad in the issue of said bonds, and in the mortgage made to secure the payment thereof. (*Garrison agt. Marie and others, ante, 848.*)
8. Defendants herein, acting as a committee of stockholders, owning and possessing in their own right, or in trust for others, a large number of shares of the capital stock of the said Pacific railroad, in March, 1876, applied to the said United States circuit court to be allowed to intervene and defend the said foreclosure suit on their own behalf, and in behalf of all other stockholders. Plaintiff herein, on his own application was made a co-complainant in the foreclosure suit. (*Id.*)
9. Defendants herein, under an arrangement with the plaintiff herein, ceased all opposition to the foreclosure suit and consented to a decree of foreclosure, which decree was entered on the 6th of September, 1876. (*Id.*)
10. The property of the said Pacific railroad was sold under said decree on the sixth of September following, and bid in for \$3,000,000, by Baker, the solicitor of said Pacific railroad, for a combination of bond-holders who acted in opposition to the plaintiff herein. (*Id.*)
11. Defendants herein, at once re-

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- solved to resist the decree of foreclosure and sale thereunder, and to take all legal means in their power to set the same aside. They opposed the confirmation of the sale, and in said month of September, applied to the said circuit court for liberty to intervene to set aside the decree of June 6, 1876, and the sale thereunder, and for liberty to demur, answer, plead or appeal, as advised. (*Id.*)
12. In March, 1877, at a meeting of stockholders held at St. Louis, defendants herein, by means of stock owned and controlled by them procured several of themselves to be elected officers and directors of said Pacific railroad; and thereafter caused to be taken and prosecuted an appeal in the name of said Pacific railroad to the supreme court of the United States from the said decree of foreclosure, which appeal was decided in the October term of 1879 (*Pacific R. R. agt. Ketcham*, 101 *U. S. R.*, 289). (*Id.*)
13. The court held that there was no error which could be corrected on appeal from the decree, but that a redress of grievances must be obtained, if any there were, by application to the court in which said decree was made. (*Id.*)
14. Thereafter, in 1880, the defendants herein caused a suit to be commenced in the name of said Pacific railroad against the plaintiff herein and other parties, to set aside said foreclosure and sale and have the said third mortgage and third mortgage bonds set aside as fraudulent and void. A demurrer was interposed to the bill of complaint, which was sustained by the said United States circuit court. (*Id.*)
15. An appeal was taken to the supreme court of the United States. The decision of the court below was reversed (111 *U. S. R.*, 505), and the cause was remanded to the said circuit court with directions to overrule the demurrer, with costs, and to take such further proceedings in the suit as should be proper and not inconsistent with the opinion of said supreme court. The court held that the said bill of complaint was, in substance and effect, a continuation of the said Ketcham foreclosure suit. (*Id.*)
16. In 1878, the defendants herein commenced an action in the superior court of the city of New York against the plaintiff herein, to recover \$3,600,000 with interest from the 24th of October, 1876, on the ground that in 1876 he agreed with them to organize a successor company to the said Pacific railroad, and give them in exchange for thirty-six thousand shares of the capital stock of that company a like number of shares in such successor company, they alleging in their verified complaint that plaintiff herein agreed to do this in consideration of the relinquishing by them of all further opposition to the Ketcham foreclosure suit. They averred in their said complaint, that without their cooperation and consent the said decree of foreclosure and sale would not then have been made. By consent of parties this action was referred to Hon. THEODORE W. DWIGHT to hear and determine. The trial before the said referee was commenced and prosecuted before him until the 24th of May, 1884, when it was suspended until December 19, 1884. (*Id.*)
17. This action was commenced to restrain the defendants herein from further prosecuting the trial of the action in the said New York superior court, until the said action pending in the said United States circuit court for the eastern district of Missouri shall have been finally determined. A preliminary injunction having been granted on motion of plaintiff to continue such injunction *pendente lite* :

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Held, that this court has undoubtedly power to restrain parties from proceeding with actions in other courts of this state, whether they be such as under the former division would have been known as actions at law or suits in equity.

Held, that the facts established a clear case for the interposition of a court of equity to prevent injustice and wrong, and that the injunction should be continued *pendente lite*.

Held, that the suits and legal proceedings of the defendants herein being glaringly inconsistent and contradictory, they having elected in the first instance to rescind their alleged contract with the plaintiff herein, they should be required first to proceed with the suit grounded upon that election.

Held, that upon the facts appearing in the motion papers, the proper course of the plaintiff was to bring an action for relief, and not to apply in the New York superior court case, for a stay of proceedings. (*Id.*)

18. Section 772 of the Code of Civil Procedure, prescribing what judges may make orders out of court without notice, with indifference as to the particular court in which the action may be, does not apply to injunction orders, in respect to which the special provision contained in section 606 controls. (*The People ex rel. Roosevelt and others agt. Edison, ante, 482.*)

19. A judge of the court of common pleas is not a county judge, and has not the power of one, within the meaning of section 606, providing that an injunction order can only be granted by a judge of the court where the action is, or by that court, or by a county judge. (*Id.*)

20. A judge of the common pleas has not power, therefore, to grant

an injunction order in an action in the superior court, and a person violating such an order is not guilty of contempt (*Revering & O., ante, 281*). (*Id.*)

21. An injunction may be issued upon affidavit without a complaint. The state courts have no authority to issue an injunction to prevent an infringement of a patented invention. The courts of the United States are invested with exclusive jurisdiction over that subject, and it cannot be exercised by the courts of the states. (*The Continental Store Service Co. agt. Clark and others, ante, 497.*)

22. Where an injunction has been issued upon affidavits, which show the controverted fact upon which the disposition of the litigation will probably be required to depend to be the title of certain patents, and it is deemed to be too uncertainly presented to be disposed of on affidavits, a reference is authorized by section 1015 of the Code of Civil Procedure, upon which the evidence may be orally produced before the referee affecting the rights of the parties. (*Id.*)

See CONTEMPT.

Roosevelt agt. Edison, ante, 231.

INSURANCE (LIFE).

1. Though a life insurance company may reinstate a certificate of membership after it has been forfeited, so far as its own rights were affected, yet where the holders of other certificates have been benefited by such forfeiture, by the very terms of the certificate itself, the company cannot, without their consent, deprive them of the benefits thus accruing by the terms of their contract. (*Milligan agt. Goddard, ante, 877.*)

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INTEREST.

1. Where the services for which the suit was brought were rendered on special request of defendant's, and were to be paid for, the pay is due when such services were performed, and after such time interest should be allowed. (*Burlingame* agt. *Central Railroad Company of Minnesota*, ante, 478.)

See EXTRA ALLOWANCE.

Bord agt. *N. Y. C. and H. R. R. Co.*, ante, 1.

See WILL.

In the Estate of Morgan L. Savage, ante, 379.

JOINDER AND NON-JOINDER.

1. A bill against the personal representatives of a deceased person to impress a lien upon the decedent's real estate cannot be joined with an action under the statute against his heirs and their grantees (*Hayward* agt. *McDonald et al.*, ante, 229.)

JUDGMENT.

1. Foreign judgment — when a decree recovered in foreign liquidation proceedings cannot be enforced here against a resident of this state. (*Anderson* agt. *Hadson*, 33 *Hun*, 435.)
2. What must be shown to sustain an action upon a foreign judgment. (*Id.*)
3. Foreign judgment — when valid although the summons was not personally served. (*Huntley* agt. *Baker*, 33 *Hun*, 578.)
4. Error in the proof of service of a summons—when immaterial. (*Id.*)
5. Domicile—how determined. (*Id.*)
6. Motion to vacate a judgment be-

cause of fraud — when it may be made by one not a party to it. (*Marshall* agt. *McGee*, 33 *Hun*, 354.)

7. When the application need not be made within two years from the filing of the judgment-roll — Code of Civil Procedure, sec. 1290. (*Id.*)
8. Estoppel — a judgment is a bar, not only as to matters considered and decided, but as to those which might have been litigated and determined. (*Pray* agt. *Hegeman*, 33 *Hun*, 358.)
9. Partition — provision in an interlocutory decree for the protection of the interests of contingent remaindermen — an error in the judgment confirming the sale, as to the disposition of the proceeds thereof, will not affect the title of a purchaser — a trust fund need not always be paid into court. (*See Rockwell* agt. *Decker*, 33 *Hun*, 343.)
10. Usury—to constitute it the agreement to pay excessive interest must be an absolute one — judgment in partition — effect thereof, on the rights of mortgagees who are parties thereto as between each other. (*See Home Ins. Co.* agt. *Dunham*, 33 *Hun*, 415.)
11. A judgment only concludes the parties as to the issues actually decided. (*See Jackson* agt. *St. Paul Fire and Marine Ins. Co.*, 33 *Hun*, 60.)
12. Judgment of foreclosure and for any deficiency arising on a sale — when a judgment for deficiency may be entered without a sale. (*See Stewart* agt. *Hamel*, 33 *Hun*, 44.)
13. Docketing of decrees of a surrogate — form of the execution to be issued upon them — Code of Civil Procedure, sec. 2554. (*See Bingham* agt. *Burlingame*, 33 *Hun*, 211.)

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14. Dissolving marriage--effect of on dower rights. (See *Ryckman* agt. *Ryckman*, 34 Hun, 235.)
15. Practice—a judgment entered in pursuance of a decision of the court of appeals cannot be altered by the supreme court—when a supplemental complaint may be filed after such a judgment has been entered. (*Clark* agt. *Mackin*, 34 Hun, 345.)
16. Action to charge trustees of a manufacturing corporation with its debts—the trustees are not bound by a judgment recovered against the company. (See *Kraft* agt. *Coykendall*, 34 Hun, 285.)
17. Trover—a judgment and an imprisonment thereunder without satisfaction does not vest title to property in a wrong-doer. (See *Goff* agt. *Craven*, 34 Hun, 150.)
18. Summary proceedings to recover land by a purchaser at a sale under execution—Code of Civil Procedure, sec. 2232—the validity of the judgment cannot be attacked collaterally therein. (See *Gelling* agt. *Mohr*, 34 Hun, 340.)
19. Power of the courts to allow amendments to be made *nunc pro tunc*—Code of Civil Procedure, sec. 723. (See *Tobin* agt. *Cary*, 34 Hun, 431.)
20. Irregularity in the form of a verdict—when the erroneous portion should be disregarded and a proper judgment entered. (See *Post* agt. *Stockwell*, 34 Hun, 373.)
21. The failure of an executor to pay over money as required by the terms of a decree, is punishable as a contempt—Code of Civil Procedure, secs. 2552, 2555. (See *Matter of Snyder*, 34 Hun, 302.)
22. For alimony—if the defendant fails to pay it he may be punished for a contempt—Code of Civil Procedure, secs. 1772, 1773, 2236 (See *Ryckman* agt. *Ryckman*, 34 Hun, 235.)
23. For divorce—a provision made therein for the wife's support is liable to be seized by creditors. (See *Stevenson* agt. *Stevenson*, 34 Hun, 157.)
24. A judgment binds only privies and parties. (See *Bram* agt. *Bram*, 34 Hun, 487.)
25. In an action for the recovery of money only, and so necessarily triable by a jury (*Code of Civil Procedure*, sec. 968), in which if so tried an interlocutory judgment could not be given, if a jury is waived and the case tried by the court, and if a proper case is made out, such a judgment may be rendered, the same as if the action were originally triable by the court. (*Cornell* agt. *Cornell*, 96 N. Y., 108.)
26. The provision of the act of 1893 (*chap. 228, Laws of 1893*), providing "that the appellate court shall have power upon any writ of error," upon reversal of judgment, where it appears that the conviction was legal and regular, "to remit the record to the court in which such conviction was had, to pass such sentence as the appellate court shall direct," was not repealed by the Code of Criminal Procedure, so far as actions then pending are concerned, but is continued in force as a rule of procedure in respect to such actions (sec. 962), and is applicable, although the case be brought up by appeal as authorized by said Code, instead of by writ of error. (*People* agt. *Bork*, 96 N. Y., 188.)
27. The provision requiring the court to which the record is remitted to pass such sentence as the "appellate court shall direct" does not require the appellate court to fix the time of imprisonment or to exercise a discretion in respect to punishment given to the court in

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which the conviction was had. Sentence is directed within the meaning of the provision when the appellate court points out the law providing for the punishment, and directs the court below to sentence thereunder. (*Id.*)

28. A judgment *in rem.* of a domestic as well as a foreign court, where jurisdiction over the person of a party has not been obtained, except as to his interest in the property affected by the judgment, is not conclusive or binding upon him by way of estoppel in another action. (*Durant* agt. *Abendroth*, 97 N. Y., 182.)

29. It is not essential to the validity of a sentence to imprisonment in a county penitentiary, under the statute authorizing such imprisonment (*chap. 308, Laws of 1874, as amended by chap. 108, Laws of 1876*), that it shall state that the prisoner is "to be received, kept and employed in the manner prescribed by law and the rules of the penitentiary." That provision of the statute is no part of the sentence, but is simply directory to the keeper of the penitentiary. (*People ex rel. agt. Sadler*, 97 N. Y., 146.)

30. A draft of judgment in an action tried by the court, which was filed in the county clerk's office for the purpose of entry, had appended to it the signature of the judge rendering the decision. No copy of such signature was appended to the paper purporting to be a copy of the judgment, as entered, served on the defeated party: *Held*, that this did not affect the regularity of the copy served; that on filing the decision, it was the duty of the clerk to enter judgment in conformity therewith, without further warrant (*Cocle Civil Pro.*, sec. 1228); he might himself prepare and enter it or adopt the draft presented, and so the signature was no part of the judgment, and was wholly superfluous. (*Olapp* agt. *Hawley*, 97 N. Y., 610.)

31. It is only where an interlocutory judgment is rendered, with a direction that final judgment be settled by the court or referee, that the signature of the judge or referee to the final judgment is required (*Sec. 1231*). (*Id.*)

JUDICIAL ACTS.

1. The fact that a public agent exercises judgment and discretion in the performance of his duties does not make his action or powers judicial in their character. (*People ex rel. agt. Bd. Com'rs Pub. Parks*, 97 N. Y., 87.)

JURISDICTION.

1. Want of service of process is a jurisdictional defect. If a court, whether of limited jurisdiction or not, undertakes to hold cognizance of a cause without having gained jurisdiction of the person by having him before them in the manner required by law, the proceedings are void. The jurisdiction of a court may be inquired into, although the record of the judgment states facts giving it jurisdiction. It may be disproved by evidence notwithstanding recitals in the record. (*The Methodist Book Concern and Company* agt. *Hudson*, ante, 517.)
2. After commenting on defendant's affidavits as to service of summons, &c.:
Held, that in view of this proof and of all the circumstances surrounding it, the affirmation of the record is entitled to greater weight as evidence establishing jurisdiction, than the negation of the defendant. (*Id.*)
3. A return by a sheriff to an execution can only be impeached by direct motion to set it aside, and not collaterally.

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4. Objections to the proper service of an order for the examination of a judgment debtor must be raised at the first opportunity. His appearance and submission must be regarded, if the order was null, as voluntary, whereby he waived objection if any to the jurisdiction of the person. (*Id.*)

5. A petition for the vacation of certain decrees made by a surrogate upon several accountings, by one who was an infant at the time the decrees were made, where the ground of relief is the infancy of the party applying, must be made within one year from the time the petitioner attains his majority. (*Matter of the Several Accountings, &c., of William Tilden, deceased, ante, 409.*)

6. Where there were four successive decrees of the surrogate, which, before the attempt by motion to vacate them, had stood unquestioned for eleven, nine, six and three years respectively; the infant, a party duly served in all, had come of age three years before he made his motion. In respect to the oldest decree alone, a defect amounting not to an irregularity, but at most (if anything) to what is strictly known as "error in fact *de hors* the record" being alleged, and in respect to the other three no irregularity and no error in fact was even alleged. The judgment or order appealed from vacates them all, the first for the alleged error in fact, the other three for negligence in the guardians *ad litem*, or in the surrogate, the charges of fraud in respect to all not being passed on, or made grounds of the action of the court:

Held, that the supreme court at general term had no jurisdiction or power, *on motion*, to vacate either of the decrees, because the time allowed for that purpose by the statute had expired before the application was made. (*Id.*)

7. The order setting aside the de-

crees was the necessary termination of the proceedings, and rendered it a final order within the meaning and intent of the statute, and as the court below had no power to make the order it is reviewable here. (*Id.*)

See SURREGATE.

In the Estate of Joshua York, ante, 16.

See COUNTY COURT.

Hesnan agt. New York, West Shore and Buffalo Railway Company, ante, 53.)

8. Motion for a new trial on the minutes—when an appearance and consent estops a party from denying the regularity of a motion, or the jurisdiction of the court to hear it. (*Emmerich agt. Hefferan, 88 Hun, 54.*)

9. Power of the court to reconsider a decision during the circuit at which it was made. (*Id.*)

JURY.

1. Where the foreman of a jury announces a verdict different from that agreed to by the jury, and the erroneous statement is taken and recorded and the jury allowed to separate, the court, upon application made at the same circuit and upon the following day, has power to call the jury together and interrogate them as to the verdict they agreed upon, and to correct the record so as to make the verdict conform to the actual finding. (*Burlingame agt. Central Railroad Company of Minnesota, ante, 478.*)

2. Affidavits of the jurors showing the mistake, may be received upon such application. (*Id.*)

JUSTICES' COURTS.

1. In an action in a justice's court, during the progress of the trial

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and while the plaintiff was examining one of his witnesses, the defendant appeared before the justice by his attorney and asked to be permitted to answer and disprove the case as made by the plaintiff. The justice denied the request:

Held, error; the discretion that is given to a court is a "judicial discretion," which must be exercised according to legal and just rules. It cannot be an arbitrary discretion to be exercised as the court shall arbitrarily decide, overriding the natural rights of a suitor and depriving one of his means of fairly meeting a claim urged against him. (*Doty* agt. *Campbell*, ante, 101.)

JUSTICE OF THE PEACE.

1. Action for penalties in a justice's court — a proper reference to the statute must be indorsed upon the summons — Code of Civil Procedure, sec. 1897. (*See Hitchman* agt. *Buxter*, 34 *Hun*, 271.)
2. The limitation of age contained in the judiciary article of the state constitution (sec. 18, art. 6), does not apply to a justice of the peace; he does not "hold the office of justice or judge of any court within the meaning of the article." (*People ex rel. agt. Mann*, 97 *N. Y.*, 530.)
3. A justice of the peace, therefore, may be elected to, and may hold that office, after the expiration of the year in which he reaches the age of seventy. (*Id.*)
4. A concise historical statement of the origin and growth of the office of justice of the peace given. (*Id.*)

LARCENY.

1. To convict of a crime for violation of official duty it is not necessary to

prove that the accused is a *de jure* officer; if he holds the office *de facto* it is enough. (*The People* agt. *Church*, ante, 366.)

2. Section 528 of the Penal Code covers a case of an appropriation by the chamberlain of a city to his own use of public moneys in his hands, and the indictment therefor need not be found under section 471, or the provisions of a city charter. (*Id.*)
3. There may be more crimes than one in a single transaction, and where the illegal act offends against two or more statutes a prosecution under any one of them is proper. (*Id.*)

LEGACY.

See WILL.

In the Estate of Morgan L. Savage, ante, 319.

LIMITATIONS (STATUTE OF).

1. The statute of limitations will not run in favor of a debtor who comes into the state under an assumed name and continues therein under such assumed name, with the intent to conceal himself from his creditors until the creditor acquires knowledge of the debtor's presence within the state. (*Engel* agt. *Fischer*, ante, 147.)

MANDAMUS.

1. When a clear legal duty devolves upon an officer or upon a board of officers, which he or it refuses to discharge, a *mandamus* will lie to compel the performance of that which the law requires to be done. (*The People ex rel. Millsbaugh* agt. *Town Auditors of Shawangunk*, ante, 224.)

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2. Although the rule of law is that generally the courts will not interfere by *mandamus*, when a party has an adequate remedy by action, it does not apply to a case in which when an officer refuses to discharge his duty by an appeal to some other officer the desired relief may be obtained, but to one in which a court is asked to interfere by *mandamus* when the party has a complete remedy by action. (*Id.*)

MARRIED WOMEN.

1. It was the intention of the legislature, evinced by sections 450 and 1206 of the Code of Civil Procedure, that proceedings to enforce a liability of a married woman shall be the same as if she was unmarried, and that all distinctions between a *feme sole* and a *feme covert* as to the form of the judgment to be entered is abolished. (*Brainerd* agt. *White*, ante, 156.)
2. The judgment in an action against a married woman, by section 1206 of the Code, is to be rendered and enforced as if she was single. (*Id.*)
3. In a suit against a married woman upon her promissory note, in which she charged her separate estate with the payment thereof, the plaintiff is entitled to a simple money judgment only. (*Id.*)

MARINE COURT.

1. An appeal to the general term of the court of common pleas, in and for the city and county of New York, from an order of the general term of the marine court of that city, granting a new trial, is allowed only upon condition that the appellant consent to a final judgment against him if the order is affirmed (sec. 9, chap. 545, *Laws of 1874*). Without such a consent, therefore, there can be no appeal and no final judgment entered

upon it. (*Wilmors* agt. *Flack*, 96 *N. Y.*, 512.)

MOTION AND ORDER.

1. County courts—may entertain motions for new trials made upon the minutes of the judge—an appeal lies from orders made thereon to the general term—no question will be considered by the general term that does not appear from the appeal book to have been presented to the county court—error, in entering such an order without stating the grounds upon which it was made, is to be corrected by motion and not by appeal—motion for a new trial—how made. (*See Hinman* agt. *Stilwell*, 34 *Hun*, 178.)
2. Motion to continue an injunction—right of the plaintiff to furnish additional affidavits—Code of Civil Procedure, sec. 627. (*See Cagney* agt. *Fisher*, 84 *Hun*, 549.)
3. Frivolous answer—what is—an order denying a motion to strike out an answer as frivolous is not appealable. (*See Carpenter* agt. *Adams*, 84 *Hun*, 429.)
4. Attachment—on a motion to vacate, upon the original papers, no affidavits sustaining it can be read. (*See Sutherland* agt. *Bradner*, 84 *Hun*, 519.)
5. An application for an order requiring the receiver of an insolvent bank to pay over a fund held by it in trust is not a motion as defined by the Code of Civil Procedure (sec. 768), but a special proceeding "for the enforcement or protection of a right" (sec. 8334) in which costs may be awarded in the discretion of the court as in an action. (*People* agt. *City Bank of Rochester*, 96 *N. Y.*, 39.)
6. Where an order of general term deciding an appeal refers to the opinion for the grounds of its judgment the opinion may be looked

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- to to ascertain those grounds. (*Snyder* agt. *Snyder*, 96 N. Y., 68.)
7. Upon a motion to change the place of trial of local action where venue is had in the wrong county the power of the court to change the place of trial for the convenience of witnesses or other cause if it exists, as to which, *quære* (*Code*, sec. 987), may not be invoked; that power can only be exercised upon motion made after the action is put in the situation in which defendants were entitled to have it placed when it was commenced. (*Acker* agt. *Leland*, 96 N. Y., 383.)
 8. Order directing a further return to a writ of *habeas corpus* not appealable. (*See In re Larson*, 96 N. Y., 381.)
 9. When recital in order *prima facie*, and when conclusive evidence of facts stated. (*See A. grt. Ins. Co.* agt. *Barnard*, 96 N. Y., 525.)
 10. Upon a motion for a new trial on exceptions ordered to be heard in the first instance at general term, all controverted questions of fact are to be regarded as settled by the verdict, and neither the general term nor this court may consider the weight of evidence or set aside the verdict on the facts, unless there is such an absence of evidence to support a material finding that the court can determine as matter of law that the fact was not proved. (*Met. Nat. Bk.* agt. *Serret*, 97 N. Y., 320.)
 11. Where a judgment in an action tried by the court or a referee is reversed and a new trial granted at general term, and the order fails to show that the reversal was upon the facts, this court must assume that it was granted upon questions of law only. (*Rider Life-Raft Co.* agt. *Roach*, 97 N. Y., 378.)
 12. It is the duty of the party succeeding at general term, if its determination was influenced by questions of fact, to see that the order so states, or to have it corrected on motion; if he fails so to do, those questions may not be considered here. (*Id.*)
 13. An order of a county court in proceedings under the Drainage Act (*chap.* 888, *Laws* of 1869, amended by *chap.* 803, *Laws* of 1871), as amended in 1881 (*chap.* 608, *Laws* of 1881), determining that a new or second assessment is necessary and directing the same is final upon matters of fact, but is appealable to the general term of the supreme court, and to this court upon any question of law arising upon the whole act, or upon any proceeding necessarily affecting such order. (*In re Swan*, 97 N. Y., 492.)
 14. M. joined with several other landowners in a general petition to vacate an assessment. While the proceeding was pending M. paid his assessment. Subsequently the petitioners moved for leave to sever their petitions, which motion was granted upon condition that the substituted several petitions should contain the same allegations as the general one. M. thereupon filed a separate petition. *Held*, that the proceedings thereon could not be deemed a new and original one, but simply a continuation of the one then pending, and therefore the payment of the assessment was no bar to the relief sought. (*In re Mehrbach*, 97 N. Y., 601.)
 15. Also *held*, that the court had power to make the order of severance. (*Id.*)
 16. On trial at circuit the court dismissed complaint; subsequently at same circuit, on motion made with defendant's consent and upon waiver of all questions as to regularity, the trial court vacated the order of dismissal, and granted a new trial. The general term dismissed appeal from the order

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granting new trial. On appeal to this court: *Held*, that the order of the circuit court appealed from was not void for want of jurisdiction, and the consent was a full answer to all questions as to regularity, also that the general term order dismissing the appeal was proper. (*See Emmerich agt. Hefseran* [Mem.], 97 N. Y., 619.)

17. Order vacating attachment on ground of insufficiency of affidavits upon it which was granted, not reviewable here. (*See Bate agt. McDowell* [Mem.], 97 N. Y., 646.)

NATURALIZATION.

1. Upon the marriage of an alien widow with a naturalized citizen of the United States, she, as well as her infant children residing in this country become *ipso facto*, naturalized citizens of the United States, and as such entitled to all the rights and privileges of said citizenship as fully as though naturalized by the judgment of a court of competent jurisdiction. (*The People agt. Newell*, ante, 8.)

2. Various statutes and authorities on the subject of naturalization reviewed and commented on. (*Id.*)

NEGLIGENCE.

1. Where a passenger upon a street car, subsequently to alighting, was pulled down by the conductor's holding on to him after starting the car:

Held, that he had a good cause of action against the railroad for the injuries sustained. (*Bonney agt. The Bushwick Railroad Company*, ante, 66.)

NEW TRIAL.

1. If a charge to the jury in mentioning the facts of a transaction

as narrated by the defendant's witnesses makes a remark which, though correct as applied to the defendant's version, applies also to the plaintiff's version, and tends to cut him off from a recovery; it is error for which a new trial should be granted. (*Bonney agt. The Bushwick Railroad Company*, ante, 66.)

2. The plaintiff brought this action to assert her title to dower in certain real estate owned in his lifetime by one Price. The defense was that her marriage with Price had been annulled because he had a wife living at the time his marriage with plaintiff was solemnized. A judgment for defendants, on the report of a referee, was reversed on appeal, and judgment directed for plaintiff. Defendants moved for a direction for a new trial, in place of such judgment, because upon another trial further proof could be made by a stipulation entered into in the action brought against plaintiff for the decree nullifying their marriage, by Price, which would preclude her from recovering the dower in his real estate:

Held, that as this stipulation was known to the parties at the time of the trial, and had been relied upon by way of answer and defense, but the proof was withheld simply because it was believed that the defense was well enough without it, it is too late to open the case again for further proof. (*Price agt. Price*, ante, 142.)

3. Where, on a motion for a new trial, all the facts sought to be placed before the jury as new evidence might, with proper diligence, have been known to the defendant's attorney, yet the failure of the attorney to set up those facts should not prejudice his client or prevent a new trial if the facts really existed, and are such as should be submitted to the jury on a trial of the case.

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(*Roberts* agt. *Stuyvesant Safe Deposit Company*, ante, 887.)

See OVERSEER OF THE POOR.

Horton agt. *Carrington*, ante, 124.

4. Motion for a new trial on the minutes — when an appearance and consent estops a party from denying the regularity of a motion, or the jurisdiction of the court to hear it — power of the court to reconsider a decision during the circuit at which it was made. (*See Emmerich* agt. *Hefferan*, 83 *Hun*, 54.)

5. Appeal — when the general term may order a judgment for the appellant without directing a new trial — a party voluntarily withholding evidence will not be granted a new trial in order to enable him to introduce it. (*See Price* agt. *Price*, 83 *Hun*, 432.)

6. County courts — may entertain motions for new trials made upon the minutes of the judge — an appeal lies from orders made thereon to the general term — no question will be considered by the general term that does not appear from the appeal book to have been presented to the county court — error, in entering such an order without stating the grounds upon which it was made, is to be corrected by motion, and not by appeal — motion for a new trial — how made. (*See Hinman* agt. *Stilwell*, 84 *Hun*, 178.)

7. A new trial cannot be had in the county court on an appeal from a judgment in summary proceedings — Code of Civil Procedure, secs. 2280, 3068. (*See Brown* agt. *Cassady*, 84 *Hun*, 55.)

8. An order denying a motion for a new trial on the ground of surprise, and newly-discovered evidence not reviewable here. (*See Smith* agt. *Platt* [Mem.], 96 *N. Y.*, 635.)

9. Upon a motion for a new trial on

exceptions ordered to be heard in the first instance at general term, all controverted questions of fact are to be regarded as settled by the verdict, and neither the general term nor this court may consider the weight of evidence or set aside the verdict on the facts, unless there is such an absence of evidence to support a material finding that the court can determine as matter of law that the fact was not proved. (*Met. Nat. Bank* agt. *Sirret*, 97 *N. Y.*, 820.)

10. Where a judgment in an action tried by the court or a referee is reversed and new trial granted at general term, and the order fails to show that the reversal was upon the facts, this court must assume that it was granted upon questions of law only. (*R. S. R. Co.* agt. *Roach*, 97 *N. Y.*, 378.)

NEW YORK CITY COURT.

1. Under section 819 of the Code of Civil Procedure, an application for the removal of a cause from the New York city court into the supreme court, and to change the place of trial, may be made at any time after the joinder of an issue of fact, and before the trial thereof, and no demand is necessary for a change of place of trial prior to the notice of application. Whether the order should be granted or not is purely a matter of discretion. (*Granger* agt. *Sheble*, ante, 130.)

2. Where, on appeal from an order denying the motion to remove, it appeared that the justice granting the order did not examine the case upon its merits the elements of discretion is not called in question. (*Id.*)

3. *It seems*, that in applications of this character something more is required to be shown than the mere fact that the defendant is not a resident of the county where the action is brought. (*Id.*)

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4. Where an action is brought in the city court of New York, and the plaintiff fails to recover over fifty dollars by reason of the allowance of a counter-claim pleaded and growing out of the same transaction alleged in the complaint, the defendant is entitled to costs. (*Gregory* agt. *McArdle et al.*, ante, 187.)

NEW YORK (CITY OF).

See BOARD OF ESTIMATE AND AP-
PORTIONMENT.

Bird agt. *The Mayor, &c.*, of the City of New York, ante, 189.

See INJUNCTION.

Roosevelt and others agt. *The Mayor of New York and others*, ante, 205.

NON-RESIDENT.

1. Mere presence in the state during business hours does not constitute residence, so as to relieve an attorney from his liability for costs, under section 8378 of the Code of Civil Procedure. (*Krom* agt. *Kur-scheidt*, ante, 88.)
2. It is no answer under this section that the attorney commenced the action in good faith and in the belief that the plaintiff and his family were domiciled in New York. (*Id.*)
3. Nor does the omission of the defendant to demand security for costs during the pendency of the action affect the attorney's liability. (*Id.*)

NOTARY PUBLIC.

1. A verification certified to by a female notary is valid as to third persons and furnishes no ground for returning the pleadings. The parties to the record cannot test the eligibility of a female to hold

office in any such collateral manner. The right can be tested only in a direct proceeding brought for the purpose in which the notary may defend her title. (*Findlay* agt. *Thorn et al.*, ante, 76.)

2. Whether a female may hold public office in this state, *quære*. (*Id.*)

OFFICE AND OFFICER.

1. To convict of a crime for violation of official duty it is not necessary to prove that the accused is a *de jure* officer; if he holds the office *de facto* it is enough. (*The People* agt. *Church*, ante, 366.)
2. Section 528 of the Penal Code covers a case of an appropriation by the chamberlain of a city to his own use of public moneys in his hands, and the indictment therefor need not be found under section 470, or the provisions of a city charter. (*Id.*)

OVERSEER OF THE POOR.

1. In an action brought by N., as overseer of the poor, to recover a penalty for the violation of the excise laws, N.'s term of office expired during its pendency and M. was elected to succeed him, but he afterwards resigned, and H., at a special town meeting, was elected his successor, and by order of this court, entered upon stipulation, the action was continued in name of H. It was objected on the trial that neither N. nor M. had taken the oath of office, as was required to be done by the amendment to the constitution, and that therefore the action had not been lawfully commenced by N.:

Held, first, that as N. had taken and filed the oath, which had previously been required by statute, and given the usual bond (although the oath was defective

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- under section 1, article 12 of the constitution), and then entered upon and discharged the duties of the office, he held it under the authority of a lawful election, and by at least a colorable compliance with the requirements of the law, and that is all which could be required to entitle him to represent the interest of the public as overseer of the poor of the town. (*Horton* agt. *Carrington*, ante, 124.)
2. As he was in office by virtue of the election, and this colorable compliance with the official requirements made upon him, he was at least a *de facto* officer, whose acts were valid so far as they concerned the public, or the rights of third persons having an interest in the discharge of his duties. (*Id.*)
3. As M. presented his resignation and it was accepted, and he ceased to discharge the duties of his office, and a notice of a special meeting was given and such town meeting was held, and H. was elected as the successor of M. and after that qualified and entered upon the discharge of the duties of the office, his right to continue the suit as overseer of the poor cannot be questioned. (*Id.*)
4. That the overseer himself was named in the title of the action is not error for which a new trial should be granted when after his name appeared the words "overseer of the poor." (*Id.*)
5. That the spirituous liquors which, the evidence tended to prove were obtained from the defendant were not sold at the place mentioned in the complaint, is simply a variance, and where it does not appear to have misled the defendant to his prejudice, cannot entitle him to a new trial. (*Id.*)

PARTIES.

1. The court has power, upon application of defendant to compel the sole transferee of plaintiff's claim pending suit to be made party plaintiff, changing the rule as declared in *Puckard* agt. *Wood* (17 Abb., 318); *Emmett* agt. *Bowers* (23 How., 300); *Howard* agt. *Taylor* (6 Duer, 204); affirming the theory of *Shearman* agt. *Goman* (22 How., 517). (*De Bost* agt. *Albert Pulmer Co*, ante, 508.)

See CORPORATIONS.

Halstead agt. *Dodge*, ante, 170.

2. Judgment creditors' action—when one action can be maintained to have applied in payment of the judgment legacies due severally to the judgment debtors, defendants therein—when it may be brought to reach the interests of legatees before the will has been admitted to probate. (*See Bradner* agt. *Holland*, 33 Hun, 288.)
3. Motion to vacate a judgment because of fraud—when it may be made by one not a party to it. (*See Marshall* agt. *McGee*, 33 Hun, 354.)
4. Fraudulent conveyance—a single action may be brought to set aside separate conveyances made to different persons—joint demurrer—will be overruled if the complaint be good as to any one of those joining in it. (*See Oakley* agt. *Tugwell*, 33 Hun, 357.)
5. Demurrer—upon the ground of a misjoinder of parties plaintiffs—the objection must be specifically stated—Code of Civil Procedure, sec. 490. (*See Berney* agt. *Drexell*, 33 Hun, 419.)
6. Obstruction of a sidewalk by sign boxes—when they constitute a nuisance—right of an adjoining owner to restrain it—right of the lessor to join with the tenant in the

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action (See *Hallock* agt. *Schoyer*, 33 *Hun*, 111.)

7. Action against a sheriff for the wrongful seizure of goods—when creditors who have severally indemnified the sheriff may be allowed to defend the action—Code of Civil Procedure, sec. 1421. (*Hayes* agt. *Davidson*, 34 *Hun*, 241.)
8. Action for personal injuries—it abates upon the death of the plaintiff--the recovery of a verdict by him will not make it survive if it be reversed on appeal—Code of Civil Procedure, sec. 6. (See *Kelsey* agt. *Jewett*, 34 *Hun*, 11.)
9. Surety upon an undertaking in replevin—when he will be allowed to prosecute the action brought by his principal after the latter has abandoned it. (See *Hoffman* agt. *Stein*, 34 *Hun*, 239.)
10. Foreclosure of a mortgage—when a general assignee is bound by the judgment although he is made a party individually and not as assignee. (See *Wagner* agt. *Hodge*, 34 *Hun*, 521.)

PATENTS.

1. An injunction may be issued upon affidavit without a complaint. The state courts have no authority to issue an injunction to prevent an infringement of a patented invention. The courts of the United States are invested with exclusive jurisdiction over that subject, and it cannot be exercised by the courts of the states. (*The Continental Store Service Company* agt. *Clark and others*, ante, 497.)
2. Where an injunction has been issued upon affidavits which show the controverted fact upon which the disposition of the litigation will probably be required to depend to be the title of certain patents, and it is deemed to be too uncertainly presented to be dis-

posed of on affidavits, a reference is authorized by section 1015 of the Code of Civil Procedure, upon which the evidence may be orally produced before the referee affecting the rights of the parties. (*Id.*)

PENAL CODE.

1. Section 15—The crime of assault in the third degree is a misdemeanor and punishable only by imprisonment in a penitentiary or county jail for not more than one year, or by a fine of not more than \$500, or both (Secs. 15, 222). (*People ex rel. agt. Kelly*, 97 *N. Y.*, 212.)
2. Section 96—Perjury—what instrument falls within this section of the Penal Code—that an improper person makes the affidavit is no defense to a prosecution for perjury (Sec. 98). (See *People* agt. *Bow*, 34 *Hun*, 528.)
3. Section 98—Perjury—what instrument falls within section 96 of the Penal Code—that an improper person makes the affidavit is no defense to a prosecution for perjury. (*Id.*)
4. Section 183, sub. 1—Murder in the first degree—what evidence of premeditation and deliberation must be given to authorize a submission of that question to the jury. (See *People* agt. *Conroy*, 33 *Hun*, 119.)
5. Section 183—The question as to whether the crime was committed under such circumstances, with reference to intent, as to make it murder in the first degree within the statutory definition, is one of fact, determinable by the jury.
It seems that it is the better form of pleading to charge the crime to have been committed with one of the several intents described in said Penal Code. (*People* agt. *Conroy*, 97 *N. Y.*, 62.)

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6. Section 222—The crime of assault in the third degree is a misdemeanor and punishable only by imprisonment in a penitentiary or county jail for not more than one year, or by a fine of not more than \$500, or by both (*Secs. 15, 222*). (*The People ex rel. agt. Kelly, 97 N. Y., 212.*)
7. Section 293—What is required by this section of the Penal Code, as to corroborative testimony, is that there should be some fact deposited independently altogether of the evidence of the accomplice, which, taken by itself, leads to the inference not only that a crime had been committed, but that the prisoner is implicated in it.
- The false denials of the defendant are strong corroborations of a criminal intent upon the part of the defendant in the keeping of the girl. The evidence of the officers show that the girl was at the defendant's place with his knowledge, and that it was a house of prostitution, and from these facts the jury might well infer entirely, independent of the girl's testimony, that the defendant was keeping her there for the purposes of prostitution. The evidence of the mother and the officers then showed, independent of that of the girl herself, she was under sixteen years of age, and was being kept by the defendant for purposes of prostitution. This was evidence of material facts leading to the inference not only that a crime had been committed, but that the defendant was implicated in it. (*The People agt. Platt, ante, 402.*)
8. Section 291—Where a child four years of age was committed by a police magistrate for violation of subdivision 4 of this section of the Penal Code, a judge cannot by means of a writ of *certiorari* directed to the magistrate, review the hearing had before such magistrate, and determine whether he had or had not acted upon sufficient evidence in making the order of commitment. (*The People ex rel. Eck agt. The American Female Guardian Society, ante, 137.*)
9. Section 291—A female child, under fourteen years, who was committed by a police magistrate for violation of section 297 of the Penal Code, to an institution authorized by law to receive and take charge of minors, was discharged on writs of *habeas corpus* and *certiorari* by the judge issuing the writs, though the commitment was not claimed to be either informal or defective:
- Held*, that the judge issuing the writs could not, by means of them review the hearing had before the committing magistrate, and determine whether he had or had not acted upon sufficient evidence in making the order of commitment.
- Evidence taken in writing, subscribed and sworn to by the witness, that a certain female child "actually and apparently under the age of fourteen years, to wit, aged twelve years, was found begging, receiving and soliciting alms" in a specified street, established all that was required to justify the commitment. (*People ex rel. Perkerson agt. The Sisters of the Order of St. Dominick, ante, 182.*)
10. Section 291—*Habeas corpus*—the sufficiency of the evidence upon which the relator was committed cannot be examined into—what evidence justifies the commitment of a child as a vagrant. (*See People ex rel. Perkerson agt. St. Dominick, 84 Hun, 463.*)
11. Sections 507, 711—The court of sessions has the power to suspend sentence after conviction and may at any time afterwards pronounce sentence upon same conviction.
- But if the rights or status of the prisoner change, as where when he is convicted he is under sixteen years of age and may be sentenced

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to the House of Refuge, which would not disfranchise him, after he passes that age he cannot be sentenced upon such conviction. (*The People* agt. *Harrington*, ante, 35.)

12. Sections 528, 470—To convict of a crime for violation of official duty it is not necessary to prove that the accused is a *de jure* officer, if he holds the office *de facto* it is enough.

Section 528 of the Penal Code covers a case of an appropriation by the chamberlain of a city to his own use of public moneys in his hands, and the indictment therefor need not be found under section 470, or the provisions of a city charter.

There may be more crimes than one in a single transaction, and where the illegal act offends against two or more statutes a prosecution under any one of them is proper. (*The People* agt. *Church*, ante, 366.)

13. Section 558—To make out the crime of blackmailing under the provision of the Penal Code, defining the offense, it is not necessary to show that the threat was against the person to whom the letter was directed, or that the writer was the one threatening to do the wrongful act. The offense may be committed by sending a letter conveying a threat of some other person, providing it is sent for the unlawful purpose mentioned in said provision. (*People* agt. *Thompson*, 97 *N. Y.*, 813.)

14. Section 714—Evidence—when the declaration of a third person is admissible as against one accused of a crime—witness—his credibility may be impeached by proof of conviction of any crime. (*See People* agt. *Burns*, 83 *Hun*, 296.)

PLACE OF TRIAL.

1. An action brought to set aside an assignment for the benefit of cred-

itors, on the ground that it was made to hinder, delay and defraud the assignor's creditors, where the assigned property consists in part of real estate, situate in this state, is within the meaning of the Code of Civil Procedure (*see* 982), a local action, as it is an action to annul a title and to affect an estate in real property. (*Acker* agt. *Leland*, 96 *N. Y.*, 383.)

2. Such an action, therefore, must be tried in the county where the real estate or some portion thereof is situated. (*Id.*)
3. The absence of any averments in the complaint in such an action disclosing that the assignment embraces real property is no answer to a motion on the part of defendant to change the place of trial. The plaintiff cannot, by such an omission, preclude the defendant from availing himself of his right to have the trial in the proper county; and the facts may be shown by affidavits. (*Id.*)
4. Nor is it an answer to the motion that the assignment embraces personal property within the county stated as the place of trial in the summons; the location of the real estate controls. (*Id.*)
5. Upon such a motion the power of the court to change the place of trial for the convenience of witnesses or other causes if it exists, as to which, *quære* (*Code*, *sec.* 987), may not be invoked; that power can only be exercised upon motion made after the action is put in the situation in which defendants were entitled to have it placed when it was commenced. (*Id.*)

PLEADINGS.

1. *Indebitatus assumpsit* will lie to recover the stipulated price due on a special contract where the contract has been completely exe-

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- cuted, so that only a duty to pay the money remains. (*Farley* agt. *Browning*, ante, 30.)
2. It is essential in such an action that the plaintiff should prove that the special contract has been performed on his part, as well as he must also do, if he resorts to an *indebitatus assumpsit*. (*Id.*)
 3. Where, therefore, the answer in an action of this character admits that the plaintiff had done work and furnished materials for and at the request of the defendant but denied their value, it is error to refuse to allow the defendant to prove non-performance of the contract. (*Id.*)
 4. Action for the conversion of personal property—what allegation of the ownership of the property by the plaintiffs is sufficient. (*Berney* agt. *Drezel*, 33 *Hun*, 84.)
 5. What is a sufficient allegation of a conversion thereof by the defendants. (*Id.*)
 6. Pleadings in Justices' Courts—when matter set up in an answer constitutes a defense and not a counter-claim. (*Green* agt. *Waite*, 33 *Hun*, 191.)
 7. Bill of particulars—when allowed in an action to recover damages for goods wrongfully seized by the sheriff under an attachment. (*Hayes* agt. *Davidson*, 33 *Hun*, 446.)
 8. Demurrer—upon the ground of a misjoinder of parties plaintiffs—the objection must be specifically stated—Code of Civil Procedure, sec. 400. (*Berney* agt. *Drezel*, 33 *Hun*, 419.)
 9. A denial on information and belief is bad—Code of Civil Procedure, secs. 500, 523. (*Pratt Mfg. Co.* agt. *Jordan Iron and Chem. Co.*, 33 *Hun*, 148.)
 10. Statute of limitations—a counter-claim connected with or arising out of the subject-matter of the plaintiff's demand may be set up, after an action upon such counter-claim is barred by the statute—Code of Civil Procedure, secs. 503. (*See Herbert* agt. *Day*, 33 *Hun*, 461.)
 11. Fraudulent conveyance—a single action may be brought to set aside separate conveyances made to different persons—joint demurrer will be overruled if the complaint be good as to any one of those joining in it. (*See Oakley* agt. *Tugwell*, 33 *Hun*, 357.)
 12. A denial in an answer of "each and every allegation not hereinbefore admitted or denied" is bad—Code of Civil Procedure, sec. 500. (*See Thierry* agt. *Crawford*, 33 *Hun*, 366.)
 13. Answer—the verification thereof may be omitted in an action charging the defendant with keeping a bawdy-house. (*See Anderson* agt. *Doty*, 33 *Hun*, 238.)
 14. Within twenty days after its service a demurrer may be withdrawn and an answer served. (*Carpenter* agt. *Adams*, 34 *Hun*, 429.)
 15. Right of a defendant to have a controversy between himself and a co-defendant settled—Code of Civil Procedure, sec. 1204—it only applies to causes of action connected with the one upon which the action is brought. (*Rafferty* agt. *Williams*, 34 *Hun*, 544.)
 16. Action to recover a penalty under the excise law—the reference to the statute upon the summons—when it is sufficient—Code of Civil Procedure, sec. 1897—it does not apply to the complaint—it is sufficient if the overseers of the poor prosecuting the action are such *de facto*. (*See Ripley* agt. *McCann*, 34 *Hun*, 112.)

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17. A judgment entered in pursuance of a decision of the court of appeals cannot be altered by the supreme court — when a supplemental complaint may be filed after such a judgment has been entered. (*See Clark agt. Mackin, 34 Hun, 845.*)
18. Power of a court of equity to strike out the defense of a party disobeying its orders — Code of Civil Procedure, sec. 1773. (*See Brisbane agt. Brisbane, 34 Hun, 339.*)
19. Defective highway or bridge — in an action against a town to recover damages resulting therefrom, the possession of funds wherewith to repair it must be alleged — 1881, chap. 700. (*See Eveleigh agt. Town of Hounsfield, 34 Hun, 140.*)
20. Statute of frauds — when the defense thereof must be pleaded. (*See Myers agt. Dorman, 34 Hun, 115.*)
21. It was not intended by the provision of the Code of Criminal Procedure (sec. 273), abolishing existing forms of pleading in criminal actions, to set aside the judicial construction theretofore given to the language usually employed in such pleadings; its true office is to abrogate the technical rules formerly governing such pleadings, and to substitute simpler forms and a more liberal interpretation. (*People agt. Conroy, 97 N. Y., 62.*)
22. In an indictment under said Code for murder in the first degree it is not necessary that the particular intent with which the homicide was committed shall be set forth, it is sufficient to allege that it was done feloniously, with malice aforethought, and contrary to the form of the statute (*Code of Crim. Pro., secs. 275, 284.*) (*Id.*)
23. The question as to whether the crime was committed under such circumstances, with reference to intent as to make it murder in the first degree within the statutory definition (*Penal Code, sec. 183*), is one of fact, determinable by the jury. (*Id.*)
24. It seems, that it is the better form of pleading to charge the crime to have been committed with one of the several intents described in said Penal Code. (*Id.*)
25. The objection that an indictment does not conform to the requirements of the Code of Criminal Procedure (secs. 275, 276) may only be taken by demurrer (*Secs. 321, 323.*) (*Id.*)
26. The provision of the Code of Civil Procedure (sec. 519), requiring that the allegations of a pleading shall be literally construed, applies only to matters of form. It is still the duty of a party to present a clear and unequivocal statement of his cause of action or defense, and when a material statement is susceptible of two meanings, the one most unfavorable to the pleader must be taken. (*Clark agt. Dillon, 97 N. Y., 870.*)
27. While it is competent for the opposite party to move to make the pleading more definite and certain, he is not bound so to do; this burden may not be cast upon him by the fault of the pleader. (*Id.*)
28. As to whether a plea of *ultra vires* can be interposed against a corporation by one who has contracted with it, *quare.* (*Rider Life Raft Co. agt. Roach, 97 N. Y., 373.*)
29. Where a defendant in an action on contract sets up in his answer facts which fail as a defense, but which establish an equitable right of set-off, and such facts are proved without objection on the trial, and are found by the court, defendant is entitled to the benefit thereof, although the averments in his an-

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swer are not characterized as a counter-claim. (*Acor* agt. *Hutchins*, 97 N. Y., 806.)

PRACTICE.

1. Want of service of process is a jurisdictional defect. If a court, whether of limited jurisdiction or not, undertakes to hold cognizance of a cause without having gained jurisdiction of the person by having him before them in the manner required by law, the proceedings are void. The jurisdiction of a court may be inquired into, although the record of the judgment states facts giving it jurisdiction. It may be disproved by evidence notwithstanding recitals in the record. (*The Methodist Book Concern and Company* agt. *Hudson*, ante, 517.)

2. After commenting on defendant's affidavits as to service of summons, &c.:

Held, that in view of this proof and of all the circumstances surrounding it, the affirmation of the record is entitled to greater weight as evidence establishing jurisdiction, than the negation of the defendant. (*Id.*)

3. A return by a sheriff to an execution can only be impeached by direct motion to set it aside, and not collaterally. (*Id.*)

4. Objections to the proper service of an order for the examination of a judgment debtor must be raised at the first opportunity. His appearance and submission must be regarded, if the order was null, as voluntary, whereby he waived objection, if any, to the jurisdiction of the person. (*Id.*)

5. Where defendant, a judgment debtor, was examined under an order which was set aside on the ground that the execution had not been returned at that time:

Held, that as it does not appear

that the first examination was concluded, otherwise than by the vacation of the order, a further examination founded upon another judgment and order cannot be considered as a second examination or as harassing. (*Id.*)

6. The defendant was convicted of having taken a female under the age of sixteen years for the purposes of prostitution. The indictment charged the taking for purposes of prostitution. The evidence to support the indictment was that of the mother of the child as to her age; the evidence of the girl herself, also of a female physician as to the physical condition of the girl, and the evidence of two officers of the Society for the Prevention of Cruelty to Children as to the character of the place kept by the defendant and as to an interview with the defendant. On a motion for a stay pending appeal, after reviewing the evidence:

Held, that although it may be true an appellate court may order a new trial if it be satisfied that the verdict against the prisoner was against the weight of evidence or against the law, or that justice require a new trial, whether any exceptions shall have been taken or not in the court below, in this case the verdict does not seem to be against the weight of evidence, or against the law, or that justice requires a new trial. (*The People* agt. *August Platt*, ante, 403.)

7. The evidence of what the officers saw on the twenty-ninth of August was competent, because the girl was there then, and the character of the place in which the girl was then being kept was material to show the object of the keeping. (*Id.*)

8. The character of the house being material, it having been shown what it was while the girl was there, it was competent to prove what it had been both before and

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17. A judgment entered in pursuance of a decision of the court of appeals cannot be altered by the supreme court — when a supplemental complaint may be filed after such a judgment has been entered. (*See Clark agt. Mackin, 84 Hun, 845.*)
18. Power of a court of equity to strike out the defense of a party disobeying its orders — Code of Civil Procedure, sec. 1778. (*See Brisbane agt. Brisbane, 84 Hun, 839.*)
19. Defective highway or bridge — in an action against a town to recover damages resulting therefrom, the possession of funds wherewith to repair it must be alleged — 1881, chap. 700. (*See Eveleigh agt. Town of Hounsfield, 84 Hun, 140.*)
20. Statute of frauds — when the defense thereof must be pleaded. (*See Myers agt. Dorman, 84 Hun, 115.*)
21. It was not intended by the provision of the Code of Criminal Procedure (sec. 278), abolishing existing forms of pleading in criminal actions, to set aside the judicial construction theretofore given to the language usually employed in such pleadings; its true office is to abrogate the technical rules formerly governing such pleadings, and to substitute simpler forms and a more liberal interpretation. (*People agt. Conroy, 97 N. Y., 62.*)
22. In an indictment under said Code for murder in the first degree it is not necessary that the particular intent with which the homicide was committed shall be set forth, it is sufficient to allege that it was done feloniously, with malice aforethought, and contrary to the form of the statute (*Code of Crim. Pro., secs. 275, 284.*) (*Id.*)
23. The question as to whether the crime was committed under such circumstances, with reference to intent as to make it murder in the first degree within the statutory definition (*Penal Code, sec. 183*), is one of fact, determinable by the jury. (*Id.*)
24. It seems, that it is the better form of pleading to charge the crime to have been committed with one of the several intents described in said Penal Code. (*Id.*)
25. The objection that an indictment does not conform to the requirements of the Code of Criminal Procedure (secs. 275, 276) may only be taken by demurrer (*Secs. 821, 823.*) (*Id.*)
26. The provision of the Code of Civil Procedure (sec. 519), requiring that the allegations of a pleading shall be literally construed, applies only to matters of form. It is still the duty of a party to present a clear and unequivocal statement of his cause of action or defense, and when a material statement is susceptible of two meanings, the one most unfavorable to the pleader must be taken. (*Clark agt. Dillon, 97 N. Y., 870.*)
27. While it is competent for the opposite party to move to make the pleading more definite and certain, he is not bound so to do; this burden may not be cast upon him by the fault of the pleader. (*Id.*)
28. As to whether a plea of *ultra vires* can be interposed against a corporation by one who has contracted with it, *quære.* (*Rider Life Raft Co. agt. Roach, 97 N. Y., 878.*)
29. Where a defendant in an action on contract sets up in his answer facts which fail as a defense, but which establish an equitable right of set-off, and such facts are proved without objection on the trial, and are found by the court, defendant is entitled to the benefit thereof, although the averments in his an-

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swer are not characterized as a counter-claim. (*Acer agt. Hutchins, 97 N. Y., 806.*)

PRACTICE.

1. Want of service of process is a jurisdictional defect. If a court, whether of limited jurisdiction or not, undertakes to hold cognizance of a cause without having gained jurisdiction of the person by having him before them in the manner required by law, the proceedings are void. The jurisdiction of a court may be inquired into, although the record of the judgment states facts giving it jurisdiction. It may be disproved by evidence notwithstanding recitals in the record. (*The Methodist Book Concern and Company agt. Hudson, ante, 517.*)

2. After commenting on defendant's affidavits as to service of summons, &c.:

Held, that in view of this proof and of all the circumstances surrounding it, the affirmation of the record is entitled to greater weight as evidence establishing jurisdiction, than the negation of the defendant. (*Id.*)

3. A return by a sheriff to an execution can only be impeached by direct motion to set it aside, and not collaterally. (*Id.*)

4. Objections to the proper service of an order for the examination of a judgment debtor must be raised at the first opportunity. His appearance and submission must be regarded, if the order was null, as voluntary, whereby he waived objection, if any, to the jurisdiction of the person. (*Id.*)

5. Where defendant, a judgment debtor, was examined under an order which was set aside on the ground that the execution had not been returned at that time:

Held, that as it does not appear

that the first examination was concluded, otherwise than by the vacation of the order, a further examination founded upon another judgment and order cannot be considered as a second examination or as harassing. (*Id.*)

6. The defendant was convicted of having taken a female under the age of sixteen years for the purposes of prostitution. The indictment charged the taking for purposes of prostitution. The evidence to support the indictment was that of the mother of the child as to her age; the evidence of the girl herself, also of a female physician as to the physical condition of the girl, and the evidence of two officers of the Society for the Prevention of Cruelty to Children as to the character of the place kept by the defendant and as to an interview with the defendant. On a motion for a stay pending appeal, after reviewing the evidence:

Held, that although it may be true an appellate court may order a new trial if it be satisfied that the verdict against the prisoner was against the weight of evidence or against the law, or that justice require a new trial, whether any exceptions shall have been taken or not in the court below, in this case the verdict does not seem to be against the weight of evidence, or against the law, or that justice requires a new trial. (*The People agt. August Platt, ante, 403.*)

7. The evidence of what the officers saw on the twenty-ninth of August was competent, because the girl was there then, and the character of the place in which the girl was then being kept was material to show the object of the keeping. (*Id.*)

8. The character of the house being material, it having been shown what it was while the girl was there, it was competent to prove what it had been both before and

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- after within reasonable limits, and that it was kept by the same proprietor and used for the same purposes so as to show the character of the place. (*Id.*)
9. Both the mother and girl testified as to her age, and the statute allows the jury to consider her appearance in connection with the other evidence in determining the question of age. (*Id.*)
10. It is not necessary to constitute the taking of the girl by the defendant that it was accompanied by force and violence. If the girl went to the defendant's place voluntarily, and he invited her in, and allowed her to remain there, and used her for purposes of prostitution, it would be a taking within the meaning of the statute. (*Id.*)
11. What is required by section 283 of the Penal Code, as to corroborative testimony, is that there should be some fact deposed independently altogether of the evidence of the accomplice, which, taken by itself, leads to the inference not only that a crime has been committed, but that the prisoner is implicated in it. (*Id.*)
12. The false denials of the defendant are strong corroborations of a criminal intent upon the part of the defendant in the keeping of the girl. The evidence of the officers show that the girl was at the defendant's place with his knowledge, and that it was a house of prostitution, and from these facts the jury might well infer entirely, independent of the girl's testimony, that the defendant was keeping her there for the purposes of prostitution. The evidence of the mother and the officers then showed, independent of that of the girl herself, she was under sixteen years of age, and was being kept by the defendant for purposes of prostitution. This was evidence of material facts leading
- to the inference not only that a crime had been committed, but that the defendant was implicated in it. (*Id.*)
13. The principle that in actions at law the laws of the states shall be regarded as rules of decision in the courts of the United States (*sec. 721, Rev. Stat.*), and that the practice, pleadings and forms, and modes of proceedings in such cases, shall conform as near as may be to those of the courts of the states in which the courts sit (*sec. 914*), is applicable only where there is no rule on the same subject prescribed by act of congress, and where the state rule is not in conflict with any such law. (*Matter of Fisk, ante, 432.*)
14. The statute of New York which permits a party to a suit to be examined by his adversary as a witness at any time previous to the trial, in an action at law, is in conflict with the provision of the Revised Statutes of the United States, which enacts that "the mode of proof in the trial of actions at common law shall be by oral testimony and examination of witnesses in open court, except as hereinafter provided" (*Sec. 861. Id.*)
15. None of the exceptions afterwards found in sections 863, 866 and 867, provide for such examination of a party to the suit in advance of the trial as the statute of New York permits. (*Id.*)
16. The courts of the United States sitting in New York have no power, therefore, to compel a party to submit to such an examination, and no power to punish him for a refusal to do so. (*Id.*)
17. Nor can the United States court enforce such an order made by a state court before the removal of the case into the circuit court of the United States. (*Id.*)

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18. Where a person is in custody under an order of the circuit court, for contempt in refusing to answer under such an order, this court will release him by writ of *habeas corpus* on the ground that the order of imprisonment was without the jurisdiction of that court. (*Id.*)
19. The plaintiff brought this action to assert her title to dower in certain real estate owned in his lifetime by one Price. The defense was that her marriage with Price had been annulled because he had a wife living at the time his marriage with plaintiff was solemnized. A judgment for defendants, on the report of a referee, was reversed on appeal and judgment directed for plaintiff. Defendants moved for a direction for a new trial, in place of such judgment, because upon another trial further proof could be made by a stipulation entered into in the action brought against plaintiff for the decree nullifying their marriage, by Price, which would preclude her from recovering the dower in his real estate:
Held, that as this stipulation was known to the parties at the time of the trial, and had been relied upon by way of answer and defense, but the proof was withheld simply because it was believed that the defense was well enough without it, it is too late to open the case again for further proof. (*Price* agt. *Price*, ante, 142.)
20. Where proceedings are instituted by a railroad company, under the laws of this state, to acquire title to land, and after a report by commissioners making their award, and before confirmation, the railroad company moves for leave to discontinue and abandon the proceedings, it is within the legitimate power of the court in granting it to annex such terms to go with the favor as, under the circumstances, justice and fairness to the parties require. The terms upon which the motion should be granted is within the discretion of the court. (*New York, West Shore and Buffalo Railway Company* agt. *Thorne*, ante, 190.)
21. While the provisions of the statute permitting extra allowance do not apply to special proceedings, and such allowance cannot be made under an order giving costs, but in such case the limitation to those for similar services, &c., in actions, controls, yet that restriction has no application on a motion for favor. (*Id.*)
22. The court, in granting such motion, is not restricted to taxable costs and disbursements as a condition. (*Id.*)
23. Upon the arraignment of a prisoner without counsel the law (*Code Crim. Pro. sec. 308*) requires that "he must be asked if he desire the aid of counsel, and if he does the court must assign counsel." The duty of assigning counsel carries with it the power, and the further duty to do whatever is necessary and proper to be done to enable the assigned counsel to discharge the trust which the court has devolved upon him. (*People* agt. *Willett*, ante, 196.)
24. Where a prisoner is entirely unable to furnish the money to defray the cost of transcribing the stenographer's notes, and counsel who have been assigned for his defense deposes that a proper discharge of the duties devolved upon him by the court requires a presentation of the case to the appellate tribunal, the court should provide the means necessary to enable him to do that which the court has enjoined. (*Id.*)
25. And in a proper case the court will upon motion in behalf of the prisoner direct that a copy of the stenographer's notes of the trial be furnished his counsel at the expense of the county. (*Id.*)

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23. A surrogate has power, on motion, to strike out allegations contained in a petition for the revocation of probate of a will, as irrelevant and redundant. (*In the Estate of James G. Henry, deceased, ante, 297.*)
27. Where the averments, which the moving party seeks to eliminate from the petition concern circumstances and occurrences, that must rather be regarded as matters of evidence bearing upon the issues to be tried than as necessary allegations making or attending such issues, they will be stricken out. (*Id.*)
28. Where an appeal is allowed by the common pleas from a judgment of the city court, the notice of appeal should specify that the appeal is from the order or judgment of the common pleas, as there can be no appeal to the court of appeals from the city court. (*Ansonia Brass and Copper Company agt. Connor et al., ante, 499.*)
- See INJUNCTION.*
Garrison agt. Marie and others, ante, 348.
- See SUPPLEMENTARY PROCEEDINGS.*
Bulger agt. Suivel, ante, 372.
29. Appeal — none lies to a court of sessions from a judgment of the special sessions charging a prosecutor with costs — Code of Criminal Procedure, secs. 719, 720, 749 — Code of Civil Procedure, secs. 3014, 3045. (*See People agt. Norton, 33 Hun, 277.*)
30. Appeal — when the general term may order a judgment for the appellant without directing a new trial — a party voluntarily withholding evidence will not be granted a new trial, in order to enable him to introduce it. (*See Price agt. Price, 33 Hun, 432.*)
31. Where a notice of appeal is signed by an attorney, other than the attorney of record, the objection should be raised by a motion to dismiss the appeal — a denial in an answer of "each and every allegation not hereinbefore admitted or denied" is bad — Code of Civil Procedure, sec. 500. (*See Thierry agt. Crawford, 33 Hun, 366.*)
32. Motion for a new trial on the minutes — when an appearance and consent estops a party from denying the regularity of a motion, or the jurisdiction of the court, to hear it — power of the court to reconsider a decision during the circuit at which it was made. (*See Emmerich agt. Hefferan, 33 Hun, 54.*)
33. Abandonment of a wife by her husband — the decision of a police justice may be reviewed upon a *certiorari* — the justice does not act as a court of special sessions — the wife may show that she left her husband through fear of personal violence. (*See People ex rel. Scherer agt. Walsh, 33 Hun, 345.*)
34. Action for dower — consent by the widow to receive a gross sum — at what stage of the case it does not give her such a vested right as will enable her representatives to revive the action after her death — when an extra allowance should not be made. (*See McKean agt. Fish, 33 Hun, 28.*)
35. Failure to pay alimony — commitment for contempt — form of the order — Code of Civil Procedure, secs. 1772, 1773 — inability to pay no excuse if caused by the voluntary act of the party — Code of Civil Procedure, sec. 2286. (*See Ryer agt. Ryer, 33 Hun, 116.*)
36. Assessment — joint petition of separate owners to vacate it — when the petitioners should not be allowed to amend, so as to file separate petitions. (*See Matter of Wood, 33 Hun, 1.*)
37. Improper assessment of tax — application to county judge to

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- have it refunded—an appeal lies from his order to the general term—Code of Civil Procedure, sec. 1857—1869, chap. 855, sec. 5, as amended by chap. 695 of 1871—1884, chap. 141—when a tax will not be refunded because of an error in the manner of assessing it—when an original act is not revived by the repeal of an amendatory act—Const., art. 3, sec. 16—when the subject of an act is embraced in the title—1881, chap. 18—when an act will be held valid in part and void as to the residue. (*See Harris agt. Supervisors of Niagara Co.*, 33 Hun, 279.)
38. Assessment—an application to vacate it will not lie after it has been paid—1858, chap. 838. (*See Matter of Mehrbach*, 33 Hun, 136.)
39. Eminent domain—taking of land for railroad purposes—verification of the petition—when a party is estopped from questioning it—who may verify it as an officer of the company—when the land of a landowner, over whose land the route does not pass, may be taken—the opening and closing argument—view of the premises. (*See Matter of N. Y., L and W. R. R. Co.*, 33 Hun, 148.)
40. Taking of land for railroad purposes—an order of the special term setting aside the report of commissioners is reviewable at the general term—evidence—a witness cannot testify as to “his impression of what was said.” (*See Matter of N. Y., W. S. and B. R. R. Co.*, 33 Hun, 231.)
41. Report of commissioners to appraise damages on taking land for a railroad—appeal from the order confirming the report—errors in the minutes of the testimony must be corrected by an application to the commissioners and not to the court. (*See Matter of N. Y., W. S. and B. R. R. Co.*, 33 Hun, 293.)
42. Railroad company—proceedings to acquire the title to additional lands, under section 21 of chapter 140 of 1850, as amended by chapter 237 of 1869—contents of the petition—how the determination of the company to acquire land may be shown. (*See Matter of N. Y. C. and H. R. R. Co.*, 33 Hun, 274.)
43. Railroads—proceedings by one company to acquire a right to cross the tracks of another—the proceedings are not stayed by an appeal from an order refusing to change the venue. (*See Matter of N. Y., L. and W. R. R. Co.*, 33 Hun, 270.)
44. Taking of land by a railroad company—rule by which the property is to be valued—agreement between an owner and the company for a sale of the land and for the transfer of other interests therein at a price to be fixed by commissioners named by them—in such case the court cannot appoint new commissioners on reversing the report of those named by the parties. (*See Matter of N. Y., Lack. and W. R. R. Co.*, 33 Hun, 639.)
45. Surrogate—power of, over a final accounting—when he should proceed with it, although one of the grounds of the objection made therein presents a question which he has not jurisdiction to hear and determine, and an action to obtain a determination thereof has been brought in the supreme court. (*See People ex rel Morgan agt. Rollins*, 33 Hun, 47.)
46. Surrogate—jurisdiction of—he may entertain a petition to have a sale of real estate, sold under an order of his court to pay debts set aside. (*See Matter of Lynch*, 33 Hun, 300.)
47. Surrogate—when he cannot grant an allowance to a special guardian upon his *ex parte* appli-

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- cation therefor — the provision as to costs and allowances should be inserted in the decree — Code of Civil Procedure, sec. 2558. (*See Matter of Budlong*, 83 Hun, 285.)
48. Docketing of decrees of a surrogate — form of the execution to be issued upon them — Code of Civil Procedure, sec. 2554. (*See Bingham* agt. *Burlingame*, 83 Hun, 211.)
49. Mortgage — allowing the mortgagee to enter into possession after a default of twelve months — construction of it — when the mortgage may be foreclosed at once on a failure to pay the interest. (*See Central Trust Co.* agt. *N. Y. City and N. R. R. Co.*, 83 Hun, 512.)
50. Action to foreclose a mortgage — the validity of liens prior to the mortgage cannot be contested — right of the mortgagee to be subrogated to the place of a prior mortgagee whose mortgage has been paid — power of the court over the relief to be granted. (*See Emigrant Ind. Sav. Bank* agt. *Clute*, 83 Hun, 82.)
51. Judgment of foreclosure and for any deficiency arising on a sale — when a judgment for deficiency may be entered without a sale. (*See Siewert* agt. *Hamel*, 83 Hun, 44.)
52. Partition — provision in an interlocutory decree for the protection of the interests of contingent remaindermen — an error in the judgment confirming the sale as to the disposition of the proceeds thereof will not affect the title of a purchaser — a trust fund need not always be paid into court. (*See Rockwell* agt. *Decker*, 83 Hun, 348.)
53. Bawdy-house — its continuance will not be restrained by an injunction upon the application of a party whose property is depreciated in value by it. (*See Anderson* agt. *Doty*, 83 Hun, 160.)
54. Perjury — requisites of the indictment — it need not specify in detail the issues in the action in which the false testimony was given — the testimony is material if it relate to one of several facts constituting the issue involved — what evidence in corroboration of the testimony of the impeaching witness is required. (*See People* agt. *Grimshaw*, 83 Hun, 505.)
55. Slander — in an action for slanderous words spoken by a wife the husband must be made a defendant — Code of Civil Procedure, sec. 450. (*See Fitzgerald* agt. *Quann*, 83 Hun, 652.)
56. Fraudulent conveyance — a single action may be brought to set aside separate conveyances made to different persons — joint demurrer — will be overruled if the complaint be good as to any one of those joining in it. (*See Oakley* agt. *Tugwell*, 83 Hun, 357.)
57. Motion to vacate a judgment because of fraud — when it may be made by one not a party to it — when the application need not be made within two years from the filing of the judgment-roll — Code of Civil Procedure, sec. 1290. (*See Marshall* agt. *McGee*, 83 Hun, 354.)
58. Attachment — the affidavit must show a sum due over all counterclaims known to the plaintiff — Code of Civil Procedure, sec. 636, sub. 1 — when a reference to other papers on file is unavailing in an affidavit. (*See Smith* agt. *Arnold*, 83 Hun, 484.)
59. Injunction — when a mandatory clause may be inserted in a preliminary injunction — when one of the parties to a business agreement may be appointed a receiver to close up the business against the objections of one of his associates. (*See Hanover Fire Ins. Co.* agt. *Germania Fire Ins. Co.*, 83 Hun, 539.)

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60. Action for the dissolution of an insolvent corporation — power of the court to restrain the prosecution of other actions against it. (See *Phoenix Foundry agt. North River Const. Co.*, 33 Hun, 156.)
61. Contempt of court by the violation of an injunction — the expenses of the proceedings to punish the guilty party may be included in the fine. (See *Brett agt. Brett*, 33 Hun, 547.)
62. Evidence — when the deposition of a witness taken out of the state may be read although the witness be in court — the deposition can only be suppressed by a special motion. (See *Hedges agt. Williams*, 33 Hun, 546.)
63. Examination of a party before trial — it may be granted in an action to recover property fraudulently obtained — Code of Civil Procedure, sec. 870. (See *Davenport Glucose Mfg. Co. agt. Taussig*, 33 Hun, 82.)
64. Examination of a party before trial — what constitutes a waiver of the certification and filing of the depositions. (See *Mayer agt. Ehrlich*, 33 Hun, 1.)
65. Judgment creditor's action — cannot be maintained until an execution has been issued. (See *Lichtenberg agt. Herdtfelder*, 33 Hun, 57.)
66. Judgment creditor's action — when one action can be maintained to have applied in payment of the judgment legacies due severally to the judgment debtor's defendants therein — when it may be brought to reach the interests of legatees before the will has been admitted to probate. (See *Bradner agt. Holland*, 33 Hun, 288.)
67. Pleading — a denial upon information and belief is bad — Code of Civil Procedure, sec. 500. (See *Pratt Mfg. Co. agt. Jordan Iron Co.*, 33 Hun, 554.)
68. Pleadings in justices' courts — when matter set up in an answer constitutes a defense and not a counter-claim. (See *Green agt. Waite*, 33 Hun, 191.)
69. What amendment to a complaint should not be allowed by a referee. (See *Niagara Co. Bk. agt. Lord*, 33 Hun, 557.)
70. Requests for findings of fact and conclusions of law — the court must pass upon each of them — it cannot reject them as unnecessary. (See *Goetting agt. Biehler*, 33 Hun, 500.)
71. Additional allowance — upon what it is to be computed in an action to restrain the enforcement of a final determination in summary proceedings. (See *Sheehy agt. Kelly*, 33 Hun, 543.)
72. Bill of particulars — when allowed in an action to recover damages for goods wrongfully seized by the sheriff under an attachment. (See *Hayes agt. Davidson*, 33 Hun, 446.)
73. Ejectment — will not lie by the grantee in an instrument which purports to be a deed but is in fact a mortgage. (See *Burdell agt. Burdell*, 33 Hun, 535.)
74. Execution — it ceases to be operative after a sale has been made thereunder — the attorney issuing it cannot thereafter withdraw it. (See *Thomas agt. Bogert*, 33 Hun, 11.)
75. Statute of limitations — a counter-claim connected with or arising out of the subject-matter of the plaintiff's demand may be set up after an action upon such counter-claim is barred by the statute — Code of Civil Procedure, sec. 503. (See *Herbert agt. Day*, 33 Hun, 461.)

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76. Drainage of swamps—no appeal lies from an order directing a further assessment—when an assessment may be laid before the title to the easement has been acquired—1881, chap. 608. (*See Matter of Swan*, 83 Hun, 200.)
77. Board of excise in New York—an employe thereof must apply for a warrant upon the comptroller before he can sue the city—an unreasonable refusal of the board to give the warrant relieves him from procuring it. (*See Gregory* agt. *Mayor*, 83 Hun, 451.)
78. Foreign judgment—when a decree recovered in foreign liquidation proceedings cannot be enforced here against a resident of this state—what must be shown to sustain an action upon a foreign judgment. (*See Anderson* agt. *Haddon*, 83 Hun, 435.)
79. Purchaser of personal property—when liable to the true owner therefor—mere possession of personal property does not give an apparent title—an action of replevin lies against one who has ceased to retain possession of the property. (*See Smith* agt. *Clowes*, 83 Hun, 501.)
80. Voluntary dissolution of a corporation—Code of Civil Procedure, chap. 17, tit 11—a receiver cannot be appointed until the entry of the final order of dissolution—Code of Civil Procedure, sec. 2426—the report of the referee must contain the statement required by it. (*See Matter of E. M. Boynton Saw and File Co.*, 84 Hun, 860.)
81. Surface railroads—construction of the statutes relating to, in cities and villages—1884, chap. 252—the consent of the local authorities may be procured after that of the property owners—the reasons for the refusal of the owners to consent need not be given—only owners whose names appear on the assessment-roll are entitled to notice. (*See Matter of Broadway Surface R. R. Co.*, 84 Hun, 414.)
82. Committee of a lunatic—is personally liable for rent, if he takes possession of premises under a lease held by the lunatic—he may be compelled to pay the rent by petition. (*See Matter of Otis*, 84 Hun, 542.)
83. Sale of real estate to pay the debts of a decedent—the provisions of the statute must be strictly complied with—what errors may not be disregarded or cured under section 2784 of the Code of Civil Procedure. (*See Matter of Mahoney*, 84 Hun, 501.)
84. Failure to arraign a prisoner and to require him to plead—when it does not afford a ground for the reversal of his conviction. (*See People* agt. *Osterhout*, 84 Hun, 260.)
85. Evidence—opinion of a witness, when it is admissible—the grounds of an objection to its competency must be specifically stated. (*See Amadon* agt. *Ingersoll*, 84 Hun, 132.)
86. Statute of limitations—an action against the directors of a banking association for negligence must be brought within three years—Code of Civil Procedure, secs. 894, 414—the commencement of the action by one stockholder does not stop the running of the statute against others who subsequently join as plaintiffs. (*See Brinkerhoff* agt. *Boatwick*, 84 Hun, 352.)
87. Costs—when to be allowed, as of course, to a successful appellant, on appeal from a judgment of dispossession in summary proceedings—Code of Civil Procedure, secs. 2260, 3066, 3240. (*See Harrison* agt. *Swart*, 84 Hun, 259.)
88. Removal of cause from the

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- marine court to the supreme court, in order to change the venue—Code of Civil Procedure, sec. 819. (*See Granger agt. Sheble, 84 Hun, 241.*)
89. Requests to charge—when a refusal to allow a request to be made is error. (*See Pfoefe agt. Second Avenue R. R. Co., 84 Hun, 497.*)
90. Reference—what is a sufficient delivery of the report to prevent either party from terminating it—Code of Civil Procedure, sec. 1019. (*See Little agt. Lynch, 84 Hun, 896.*)
91. A report cannot be sent back to a referee for additional findings—Code of Civil Procedure, sec. 1023—General Rule No. 32. (*See Gardiner agt. Schwab, 84 Hun, 582.*)
92. Motion to continue an injunction—right of the plaintiff to furnish additional affidavits—Code of Civil Procedure, sec. 627. (*See Cagney agt. Fisher, 84 Hun, 549.*)
93. Replevin—surety upon an undertaking in—when he will be allowed to prosecute the action brought by his principal, after the latter has abandoned it. (*See Hoffman agt. Steinau, 84 Hun, 289.*)
94. Partition—if the clerk of the court is appointed guardian *ad litem* for an infant defendant in an action of partition, he must give security. (*See Fisher agt. Lyon, 84 Hun, 183.*)
95. Ejectment—recovery of possession by the plaintiff, under a judgment which is reversed on appeal—right of the defendant to be placed in possession again—Code of Civil Procedure, sec. 1529. (*See Conger agt. Duryee, 84 Hun, 560.*)
96. Attachment—on a motion to vacate, upon the original papers, no affidavits sustaining it can be read—Code of Civil Procedure, sec. 688. (*See Sutherland agt. Bradner, 84 Hun, 519.*)
97. Settlement of a case—when an order denying a motion for a settlement is appealable. (*See Gleason agt. Smith, 84 Hun, 547.*)
98. Undertaking on an appeal in bastardy proceedings—form of it—Code of Criminal Procedure, sec. 851—the court of sessions cannot allow it to be amended when defective. (*See Ramsey agt. Childs, 84 Hun, 839.*)
99. Undertaking on appeal—when invalidated by the refusal of the sureties to justify—Code of Civil Procedure, sec. 1835. (*See Hoffman agt. Smith, 84 Hun, 485.*)
100. Code of Civil Procedure, sec. 191, sub. 3—power to allow an appeal under—by what general term it must be exercised. (*See De Freest agt. City of Troy, 84 Hun, 560.*)
101. Appeal from a judgment convicting a defendant of murder in the first degree—duty of the appellate court to grant a new trial if the verdict be against law or if justice requires a new trial—when the expense of preparing the case will be charged upon the county. (*See People agt. Jones, 84 Hun, 620.*)
102. Appeal from an order of the general term modifying a peremptory writ of *mandamus*—Code of Civil Procedure, secs. 190, 191, 1856, 2070. (*See People ex rel. Collins agt. Spicer, 84 Hun, 584.*)
103. *Habeas corpus*—What questions may be examined upon the return—questions settled by a court-martial cannot be re-examined. (*See People ex rel. Frey agt. Warden N. Y. County Jail, 84 Hun, 393.*)

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104. *Habeas corpus*—the sufficiency of the evidence upon which the relator was committed cannot be examined into—what evidence justifies the commitment of a child as a vagrant—Penal Code, sec. 291. (See *People ex rel. Persersen* agt. *St. Dominick*, 34 *Hun*, 463.)
105. Contempt—an order requiring a person to show cause why he should not be punished, made by a county judge whose term expires before the return day, may be heard before his successor—Code of Civil Procedure, secs. 52, 2457, 2462. (See *Gammon* agt. *Berry*, 34 *Hun*, 188.)
106. Contempt—the failure of an executor to pay over money as required by the terms of a decree, is punishable as a contempt—Code of Civil Procedure, secs. 2552, 2555. (See *Matter of Snyder*, 34 *Hun*, 302.)
107. Power of a court of equity to strike out the defense of a party disobeying its orders—Code of Civil Procedure, sec. 1778—effect of. (See *Brisbane* agt. *Brisbane*, 34 *Hun*, 389.)
108. *Certiorari*—audits of a board of supervisors cannot be reviewed after the roll has been signed and the tax warrants delivered. (See *People ex rel. Gale* agt. *Supervisors*, 34 *Hun*, 266.)
109. Right of a defendant to have a controversy between himself and a co-defendant settled—Code of Civil Procedure, sec. 1204—it only applies to causes of action connected with the one upon which the action is brought. (See *Rafferty* agt. *Williams*, 34 *Hun*, 544.)
110. Power of the court to allow amendments to be made *nunc pro tunc*—Code of Civil Procedure, sec. 728. (See *Tobin* agt. *Cary*, 34 *Hun*, 431.)
111. Within twenty days after its service a demurrer may be with drawn and an answer served—frivolous answer—what is—an order denying a motion to strike out an answer as frivolous, is not appealable. (See *Carpenter* agt. *Adams*, 34 *Hun*, 429.)
112. A judgment entered in pursuance of a decision of the court of appeals cannot be altered by the supreme court—when a supplemental complaint may be filed after such a judgment has been entered. (See *Clark* agt. *Mackin*, 34 *Hun*, 345.)
113. Irregularity in the form of a verdict—when the erroneous portion should be disregarded and a proper judgment entered. (See *Post* agt. *Stockwell*, 34 *Hun*, 373.)
114. Judgment creditor's action—it cannot be brought after a general assignee has distributed the debtor's estate under a decree of the county court—1877, chap. 466. (See *McLean* agt. *Prentice*, 34 *Hun*, 504.)
115. A judgment binds only privies and parties—in actions of foreclosure only subsequent lienors should be made defendants. (See *Bram* agt. *Bram*, 34 *Hun*, 487.)
116. Foreclosure—receiver of the rents and profits of the premises—disposal of the fund in payment of a subsequent mortgage. (See *Keogh* agt. *McManus*, 34 *Hun*, 531.)
117. Action to recover a penalty under the excise law—the reference to the statute upon the summons—when it is sufficient—Code of Civil Procedure, sec. 1897—it does not apply to the complaint—it is sufficient if the overseers of the poor prosecuting the action are such *de facto*—what evidence shows the liquor sold to be intoxicating. (See *Bipley* agt. *McCann*, 34 *Hun*, 112.)

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118. Action for penalties in a justice's court — a proper reference to the statute must be indorsed upon the summons — Code of Civil Procedure, sec. 1897. (*See Hitchman agt. Baxter, 84 Hun, 271.*)
119. Summary proceedings to recover lands by a purchaser at a sale under execution — Code of Civil Procedure, sec. 2232 — the validity of the judgment cannot be collaterally attacked therein. (*See Getting agt. Mohr, 84 Hun, 240.*)
120. A new trial cannot be had in the county court on an appeal from a judgment in summary proceedings — Code of Civil Procedure, secs. 2260, 3068. (*See Brown agt. Cassidy, 84 Hun, 65.*)
121. County courts — may entertain motions for new trials made upon the minutes of the judge — an appeal lies from orders made thereon to the general term — no question will be considered by the general term that does not appear from the appeal book to have been presented in the county court — error, in entering such an order without stating the grounds upon which it was made, is to be corrected by motion and not by appeal — motion for a new trial — how made. (*See Hinman agt. Stilwell, 84 Hun, 178.*)
122. County court — jurisdiction of, over proceedings of an assignee for the benefit of creditors. (*See Matter of Morgan, 84 Hun, 217.*)
123. As to the mode determining damages for land taken by right of eminent domain. (*Id.*)
124. Facts not found by a referee, and as to which no finding was requested, may not be considered for the purpose of reversing a judgment. (*Burnap agt. Nat. Bk. Potsdam, 96 N. Y., 125.*)
125. Upon a motion to change the place of trial in local action when venue is laid in the wrong county, the power of the court to change the place of trial for the convenience of witnesses or other cause if it exists, as to which, *quarre* (Code, sec. 987), may not be invoked: that power can only be exercised upon motion made after the action is put in the situation in which defendants were entitled to have it placed when it was commenced. (*Acker agt. Leland, 96 N. Y., 383.*)
126. When the record on appeal in a case tried by the court contained a paper headed "requests to find," also another paper containing exceptions to assumed refusal of the requests, but there was no "note upon the margin of the requests," as required by the Code of Civil Procedure (sec. 1023), or elsewhere, showing how, if at all, the propositions were disposed of, or that the attention of the court had been called to them: *Held*, that said assumed requests could not be considered in determining the appeal. (*Harris agt. Van Wart, 96 N. Y., 642.*)
127. The provisions of the Code of Civil Procedure (secs. 972, 1008) providing for the determination of the other issues of fact in an equity case where one or more specific questions have been submitted to a jury, and also for the review of the verdict of the jury upon the questions submitted, do not change the old practice and the verdict of the jury, although a motion for a new trial has been denied, is not conclusive upon the court on the final hearing of the action, but may be disregarded. (*Learned agt. Tillotson, 97 N. Y., 1.*)
128. Where a person convicted of assault in the third degree was sentenced to imprisonment at hard labor in state's prison: *Held*, that while the sentence was void, as the conviction was valid, the prisoner was not entitled to a dis-

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charge on *habeas corpus*, but should be remanded to the custody of the sheriff, that the trial court may deal with him according to law. (*People ex rel. agt. Kelly*, 97 N. Y., 212.)

129. The provision of the Code of Civil Procedure (*sec.* 519), requiring that the allegations of a pleading shall be literally construed, applies only to matters of form. It is still the duty of a party to present a clear and unequivocal statement of his cause of action or defense, and when a material statement is susceptible of two meanings, the one most unfavorable to the pleader must be taken. (*Clark agt. Dillon*, 97 N. Y., 870.)

130. While it is competent for the opposite party to move to make the pleading more definite and certain, he is not bound to do so; this burden may not be cast upon him by the fault of the pleader. (*Id.*)

131. Where a judgment in an action tried by the court or a referee is reversed and new trial granted at general term, it is the duty of the party succeeding, if the decision was influenced by questions of fact, to see that the order so states, or to have it corrected on motion; if he fails so to do, those questions may not be considered here. (*Rider Life Raft Co. agt. Roach*, 97 N. Y., 878.)

132. Writs of *certiorari* to review action of a board, a department of a city government, should be directed to individual members. (*See People ex rel. agt. Board of Comrs.*, 97 N. Y., 87.)

RAILROADS.

1. Where proceedings are instituted by a railroad company, under the laws of this state, to acquire title to land, and after a report by commissioners making their award, and before confirmation, the rail-

road company moves for leave to discontinue and abandon the proceedings, it is within the legitimate power of the court in granting it to annex such terms to go with the favor as, under the circumstances, justice and fairness to the parties require. The terms upon which the motion should be granted is within the discretion of the court. (*New York, West Shore and Buffalo Railway Company agt. Thorn*, *ante*, 190.)

2. While the provisions of the statute permitting extra allowance do not apply to special proceedings, and such allowance cannot be made under an order giving costs, but in such case the limitation to those for similar services, &c., in actions, controls, yet that restriction has no application on a motion for favor. (*Id.*)

3. The court, in granting such motion, is not restricted to taxable costs and disbursements as a condition. (*Id.*)

4. The lands of a railroad company are *prima facie* liable to be assessed for the costs of local improvements, the presumption being that they are benefited in common with all other lands within the area of assessment for such improvements. (*In re Cedar Park*, *ante*, 257.)

5. If the commissioners of assessment have discretion in determining what lands are benefited, it should be shown by their report why they have omitted any, and such omission of lands without explanation is an error in principle, justifying interference by the court. (*Id.*)

6. The constitutional and statutory provisions in reference to the construction and operation of street railroads makes it necessary to have the consent of the owners of one-half in value of the property bounded on each street or

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portion of a street upon which it is proposed to construct a railroad, and not merely the consent of the owners of one-half in value of the property bounded upon the whole of the route over which it is proposed to build the road. (*Hilton agt. The Thirty-fourth Street Railroad Company, ante, 453.*)

7. If that is not done, then the building of the road must be authorized by the commissioners appointed by the general term of the supreme court and by the general term itself. (*Id.*)
8. As a railroad constructed in a public street without authority would be a public nuisance, the burden of proof is upon the defendant, to show that it has such authority. (*Id.*)

RECEIVER.

1. A receiver may be appointed on the conclusion of the examination of a third person in supplementary proceedings, either before or after the return of the execution against the judgment debtor. (*De Viver et al. agt. Smyth, ante, 48.*)
2. The court has no power to appoint a receiver under proceedings for the voluntary dissolution of a corporation until the making of the final order dissolving the corporation. (*In re The E. M. Boynton Saw and File Company, ante, 69.*)

REFEREES.

1. The Code of Procedure has prescribed the method of trial before a referee, and has provided that, except in certain excepted cases, the whole or any of the issues in an action must be referred upon the consent of the parties; and where the stipulation names the referee, the clerk must enter an

order of course, referring the issue or issues for trial to that person only. (*Marie et al. agt. Garrison, ante, 82.*)

2. The referee is there given substantially the same power as is given to a judge on the trial by the court without a jury, and provision is made for an appeal from judgment upon a trial by a referee, in the same manner as upon the trial by the court without a jury. (*Id.*)
3. As the court in such case has no voice in determining whether the case should be referred, or in selecting the person who should preside at the trial, it would not be justified in vacating the order entered on such stipulation, except upon proof of some act of the referee tending to show that some means or influence other than the evidence and argument adduced before him have or will influence his decision. (*Id.*)

4. Where on a motion to remove a referee on the grounds of bias and incapacity, the party moving, to support their allegations, set forth in their affidavits a great number of the rulings of the referee on the trial of the action before him, and claimed that such rulings entitled such party to the relief demanded:

Held, that as the rulings referred to are decisions of the questions which the parties had consented should be determined by the referee named and selected by them to decide (the legislature having provided a method of review), if he has committed an error in his decisions, the defeated party should be left to his remedy by appeal. (*Id.*)

5. Section 2426 of the Code of Civil Procedure requires the report of the referee to contain "a statement of the effects, credits and other property, and of the debts and other engagements of the cor-

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poration and of all other matters pertaining to its affairs:

Held, that the requirement of the Code is one of substance and not of form, and a failure to comply with it renders the final order void. (*In re The E. M. Boynton Saw and File Company*, ante, 69.)

6. A referee is not bound to part with his report without the payment of his legal fees; and where a referee has his report ready within the statutory time, and offers to deliver it on payment of his legal fees, the same is a sufficient delivery, pursuant to section 1019 of the Code of Civil Procedure, to prevent the statute from operating as a forfeiture of his fees and a termination of the reference (*Reversing S. C.*, 67 *Haw.*, 1; *Thornton* agt. *Thornton*, 66 *Haw.*, 119, approved). (*Little* agt. *Lynch*, ante, 95.)

REFERENCE.

1. Requests for findings of fact and conclusions of law—the court must pass upon each of them—it cannot reject them as unnecessary—Code of Civil Procedure, sec. 1028. (*See Goetting* agt. *Biehler*, 83 *Hun*, 500.)
2. What is a sufficient delivery of the report to prevent either party from terminating it—Code of Civil Procedure, sec. 1019. (*Little* agt. *Lynch*, 84 *Hun*, 896.)
3. A report cannot be sent back to a referee for additional findings—Code of Civil Procedure, sec. 1023—General Rule No. 83. (*Gardiner* agt. *Schwab*, 84 *Hun*, 582.)
4. Facts not found by a referee, and as to which no finding was requested, may not be considered for the purpose of reversing a judgment. (*Burnap* agt. *Nat. Bk. of Potsdam*, 96 *N. Y.*, 125.)

REMOVAL OF CAUSE.

1. Under section 819 of the Code of Civil Procedure an application for the removal of a cause from the New York city court into the supreme court, and to change the place of trial, may be made at any time after the joinder of an issue of fact, and before the trial thereof, and no demand is necessary for a change of place of trial prior to the notice of application. Whether the order should be granted or not is purely a matter of discretion. (*Granger* agt. *Sheble*, ante, 180.)
2. Where, on appeal from an order denying the motion to remove, it appeared that the justice granting the order did not examine the case upon its merits the elements of discretion is not called in question. (*Id.*)
3. *It seems*, that in applications of this character something more is required to be shown than the mere fact that the defendant is not a resident of the county where the action is brought. (*Id.*)

REPLEVIN.

1. Where a person has seized animals under the highway act (*Laws of 1867*, chap. 814), and instituted proceedings under the statute before a justice, the owner cannot maintain an action of replevin to recover their possession, and if he does, the defendant may show what was litigated before the justice to establish his right to seize and hold the animals as a bar to the action to recover the possession of them. (*Crosey* agt. *Ferry*, ante, 40.)
2. A complaint in replevin must contain a direct issuable averment of ownership in the plaintiff, and allegations of the evidence of such ownership will not be allowed to take the place of such necessary

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avermnt. (*Gardner agt. Scovill*, 272.)

8. Where in a complaint in replevin to recover the possession of personal property it was averred (1), that the defendant detains the property set out in the schedule from the plaintiff; (2), that one Emma N. Scovill (not the defendant) executed and delivered to the plaintiff a chattel mortgage upon the property; (3), that by the terms of the mortgage the plaintiff had become entitled to the possession of the property; (4), that the defendant had its possession; and (5), refused to deliver it to the plaintiff on demand:

Held, that the complaint is fatally defective, because it is not averred that the plaintiff is the owner or has title to the property, nor that he had the right of possession by virtue of a special property therein, as required by section 1720 of the Code of Civil Procedure. (*Id.*)

REPLY.

1. In an action against an assessment insurance company, brought by a beneficiary to recover on a certificate of membership, where the defendant's answer alleged new matter, *i. e.*, the making and non-payment of an assessment:

Held, that, under section 516 of the Code of Civil Procedure, on motion of defendant's counsel, the court will require the plaintiff to reply to the new matter set up in defendant's answer. (*Rogers agt. Mutual Reserve Fund Life Association*, *ante*, 194.)

REQUESTS TO CHARGE.

1. A refusal of the court to pass upon a question of law requested by a counsel to be charged is an error for which the judgment should be reversed. (*De Bost agt. Albert Palmer Company*, *ante*, 501.)

2. This is so even though the requests be unreasonable in number. (*Id.*)

SET-OFF.

1. Where plaintiff had a verdict for forty-four dollars and nine cents, and judgment was entered for that sum, the defendant being entitled to costs, another judgment was entered for seventy-four dollars and ninety-four cents costs in his favor. The judgment in favor of the plaintiff, after its entry, and before the judgment was entered in favor of the defendant, was, by the plaintiff assigned to his attorneys in the action in consideration of their services as such attorneys:

Held, that there were two judgments entered in this action, where properly there could be only one, and that based upon the verdict, and in such case the lesser amount should be set off as against the larger of the sums to which the respective parties are entitled, and the judgment be effectual for the difference in favor of the party entitled to it. This right is one of the incidents of the action, and is superior to the lien of the attorneys or to the effect of an assignment. (*Warden agt. Frost*, *ante*, 364.)

2. Right of the executor to set off against a legacy a claim due from a firm of which the legatee was the sole surviving partner. (*Ferris agt. Burrows*, 84 *Hun*, 104.)

SHERIFF.

1. Where a sheriff makes a levy, and then receives a bond of indemnity, he is bound to hold the property until it is adjudged that it does not belong to the defendant, unless the party giving the bond instructs him to release the levy. (*Bowes agt. Wilkins*, *ante*, 21.)
2. Where an attachment is set aside for irregularity, and there is

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- no adjudication as to the ownership of the property levied on, the sheriff ought not to surrender it to a person whose claim the bond of indemnity makes it his duty to contest. Section 709 of the Code of Civil Procedure does not apply to such a case. (*Id.*)
3. A demand is not necessary before bringing an action where the sheriff levies upon the goods of a party not named in the process. (*Id.*)
 4. Even if it had been the duty of the sheriff to surrender the goods on the setting aside of the attachment, notwithstanding he had received a bond of indemnity, his retention of the goods was ratified by the attaching creditors inasmuch as they subsequently appealed from the order vacating the attachment, and thereby manifested an intention to hold the goods, if possible; and they ratified the sale of the goods under an execution, issued at their instance in the attachment suit, by accepting the proceeds of the execution sale. (*Id.*)
 5. The stay under section 170 of the new Code, which stays proceedings against the sheriff until he can collect from the bondsman of an escaped judgment debtor, is discretionary and the court will not grant it where the sheriff has not proceeded with diligence. (*Potts* agt. *Davidson*, ante, 215.)
 6. A third party order, before the return of execution need not contain the matters requisite to an affidavit and order to examine the judgment debtor himself before the return of an execution. It seems that supplementary proceedings can be maintained against the sheriff when he is a judgment debtor. (*Potts* agt. *Davidson*, ante, 216.)
 7. In an action against the sheriff for an alleged trespass in seizing and converting plaintiff's property, it is a fatal objection to an order discharging the sheriff from liability, and substituting in his place as defendants several persons who claim to have indemnified him for his acts, that the moving papers fail to show that the applicants became indemnitors to the sheriff before the commencement of the action. (*Hayes* agt. *Davidson*, ante, 810.)
 8. The provisions of the Code restricting the remedy of a party to the indemnitors of the sheriff, would seem to contemplate a seizure by that officer of property under a single execution or attachment, and the substitution of indemnitors liable upon a single bond, where the liability of the obligors is necessarily co-extensive with that of the officer whose position as defendant they seek to occupy, and not the substitution of numerous indemnitors liable for distinct and separate levies where each applicant is made joint defendant with numerous applicants, applying by other attorneys, and in separate proceedings, although the individual consents of each of the several indemnitors appearing in the record authorize only an order making the applicant alone a party defendant in the action. (*Id.*)
 9. A sheriff and his indemnitors, sued for trespass in levying upon personal property, the legal title to which is in plaintiff, under an execution against the person from whom plaintiff acquired title, may not attack the transfer for fraud without proving a judgment against the transferrer. (*McKinley* agt. *Bow*, 97 N. Y., 98.)

SPECIAL PROCEEDINGS.

1. An application for an order requiring the receiver of an insolvent bank to pay over a fund held in

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trust by it is not a motion as defined by the Code of Civil Procedure (sec. 768), but a special proceeding "for the enforcement or protection of a right" (sec. 8834) in which costs may be awarded in the discretion of the court as in an action. (*People agt. City Bank of Rochester*, 96 N. Y., 83.)

STAY OF PROCEEDINGS.

1. The stay under section 170 of the new Code, which stays proceedings against the sheriff until he can collect from the bondsman of an escaped judgment debtor, is discretionary and the court will not grant it where the sheriff has not proceeded with diligence. (*Potts agt. Davidson*, ante, 216.)

See Costa.

Pettibone agt. Drakeford, ante, 141.

2. Railroads — proceedings by one company to acquire a right to cross the tracks of another — the proceedings are not stayed by an appeal from an order refusing to change the venue. (*See Matter of N. Y., L and W. R. R. Co.*, 88 Hun, 270.)

STOCK.

1. Where shares of stock are sold to be delivered at a future time, and before the delivery the seller, to save it from forfeiture, pays assessments levied upon the stock, he has the right to refuse delivery until repayment of such assessments. (*Whitney agt. Page*, ante, 889.)

SUMMARY PROCEEDINGS.

1. Additional allowance — upon what it is to be computed in an action to restrain the enforcement of a final determination in summary proceedings. (*See Sheehy agt. Kelly*, 88 Hun, 548.)

2. Summary proceedings to recover land by a purchaser at a sale under execution — Code of Civil Procedure, sec. 2282 — the validity of the judgment cannot be collaterally attacked therein. (*Gettings agt. Mohr*, 84 Hun, 340.)

3. Parties — A new trial cannot be had in the county court on an appeal from a judgment in summary proceedings — Code of Civil Procedure, secs. 2260, 3068. (*See Brown agt. Cassidy*, 84 Hun, 55.)

SUMMONS.

1. Action for penalties in a justice's court — a proper reference to the statute must be indorsed upon the summons — Code of Civil Procedure, sec. 1897. (*See Hirschman agt. Baxter*, 84 Hun, 271.)

SUPPLEMENTARY PROCEEDINGS.

1. A receiver may be appointed on the conclusion of the examination of a third person in supplementary proceedings, either before or after the return of the execution against the judgment debtor. (*De Vivier et al. agt. Smyth*, ante, 48.)
2. A third party order, before the return of execution need not contain the matters requisite to an affidavit and order to examine the judgment debtor himself before the return of an execution. It seems that supplementary proceedings can be maintained against the sheriff when he is a judgment debtor. (*Potts agt. Davidson*, ante, 216.)
3. In proceedings supplementary to execution, after examination, a motion was made to compel defendant to pay \$215 to a receiver theretofore regularly appointed,

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which sum plaintiff claimed defendant was entitled to receive from a third party, and which defendant claimed to have disposed of by delivering to his attorney before service of the second order. An order was made referring this question of fact to a referee, who took testimony and made his report in substance that defendant's claim was true, which report was confirmed:

Held, that under section 2456 of the Code the justice properly allowed defendant his costs and disbursements and charged plaintiff therewith.

Held, also, that a provision in said order that defendant first pay the fees of the referee and stenographer amounted in effect to a direction that said judgment be satisfied *pro tanto*, and in this said order was without authority of law, and that under section 2447 of the Code the justice was vested only with power to direct the application of any money or property in the possession or under the control of the defendant belonging to him to a sheriff designated in the order or to a receiver, if one was appointed. (*Boelger* agt. *Swissel*, ante, 372.)

4. Objections to the proper service of an order for the examination of a judgment debtor must be raised at the first opportunity. His appearance and submission must be regarded, if the order was null, as voluntary, whereby he waived objection if any to the jurisdiction of the person. (*The Methodist Book Concern and Company* agt. *Hudson*, ante, 517.)

5. Where defendant, a judgment debtor, was examined under an order which was set aside on the ground that the execution had not been returned at that time:

Held, that as it does not appear that the first examination was concluded, otherwise than by the vacation of the order, a further examination founded upon another judgment and order cannot be

considered as a second examination or as harassing. (*Id.*)

SUPREME COURT.

1. The supreme court has power, notwithstanding an appeal to this court, to make its record declare the truth as to its judgment, and so may, after an appeal, amend an order reversing a judgment entered on the report of a referee by adding a statement that the reversal was upon the facts as well as the law. (*Nat. City Bank* agt. *Gold Ez. Bank*, 97 Hun, 645.)

SURETIES.

1. In an action against the sureties on an undertaking on arrest, where the nature of the cause of action and the right to the order of arrest are identical, commenced upon the vacating of the order of arrest, but before the termination of the action in which the order of arrest was granted:

Held, that the sureties were not liable on the undertaking until judgment was rendered in the action for defendant. (*Staab* agt. *Shupe et al.*, ante, 4.)

2. After two sureties, A. and B., had executed a joint and several undertaking under sections 834 and 838 of the old Code for a stay of proceedings on appeal, A. justified, but when subsequently B. was examined, the justice before whom the examination took place filed a memorandum that he was not qualified, and that defendant in that action must produce another surety. Meantime, intermediate the filing of the memorandum and the entry of an order thereon, the defendant executed the undertakings upon which this action was brought, which were approved:

Held, that by the memorandum and order referred to, the justice approved of A. as one of the sure

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ties upon the undertakings; that it was not necessary that A. should join in the execution of the undertakings with defendant, and even if A. is not liable upon his undertaking, for want of a formal indorsement of approval upon it, the defendant should not be relieved from liability on his undertakings, which stayed plaintiff's proceedings. (*Hooker agt. Townsend, ante, 107.*)

SURROGATE.

1. The surrogate has jurisdiction, upon entering a decree for the judicial settlement of an executor's account, to determine who are testator's legatees, and to what sums they are respectively entitled and in spite of the limitations of section 2743 of the Code of Civil Procedure, he may exercise such jurisdiction in respect to legacies whose validity is disputed by the executor, and even in cases where such determination necessarily involves the construction of the testator's will. (*In the Estate of Joshua York, ante, 16.*)
2. A surrogate has power, on motion, to strike out allegations contained in a petition for the revocation of probate of a will, as irrelevant and redundant. (*In the Estate of James G. Henry, deceased, ante, 297.*)
3. Where the averments, which the moving party seeks to eliminate from the petition concern circumstances and occurrences, that must rather be regarded as matters of evidence bearing upon the issues to be tried than as necessary allegations making or attending such issues, they will be stricken out. (*Id.*)
4. The requirements of sections 2572 and 2577 of the Code of Civil Procedure and the requirements of Rules 32 and 33 of the General Rules of Practice are entirely in-

dependent of each other, and the surrogate may at any time after the entry of the decree or order sought to be reviewed, extend the time for making and serving a case, even though the appeal has not been perfected, provided that the time for perfecting it is as yet unexpired. (*In the Estate of James Tilby, deceased, ante, 452.*)

See EXECUTORS AND ADMINISTRATORS.

Haight agt. Brisbin, ante, 199.

See JURISDICTION.

Matter of Several Accountings, etc., of William Tilden, deceased, ante, 409.

TAXES AND ASSESSMENTS.

1. In a proceeding by the receiver of taxes to enforce the payment of a tax of \$2,620, in the year 1881, on an assessment of \$100,000 legally imposed upon an administrator of a deceased person, the administrator set up that the deceased resided and died out of the state, but had some personal effects here when he died; that he had no notice of any tax upon the lists in this city, supposing the deceased could not be taxed in this state; that the inventory of the estate, filed in the surrogate's office in New York county, showed \$49,068.81 of assets after payment of debts upon which the tax legally chargeable would be \$1,310:
Held, that the tax having been imposed before the estate had been settled by the surrogate's decree, it was the duty of the respondent, before making the distribution under it, to ascertain what the liabilities under it were, whether for taxes or otherwise; that it was too late to question the quantum of tax, and that no cause was shown for either legal or equitable interference (*Affirming S. C., 67 How., 113.*) (*McMahon agt. Jones, ante, 270.*)

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2. By section 7 of chapter 260 of the Laws of 1881, the county treasurer of Ulster county was "empowered to acquire and hold" any lands which were sold for taxes, "and after the two years for redemption has expired, * * * to sell and convey the premises as such section directs." Where the county treasurer of Ulster county did "acquire and hold" the premises described in the complaint, under and in pursuance of the act aforesaid, and after the expiration of two years conveyed the same to the wife of the tenant occupying the premises:

Held, that a tenant is authorized as against his landlord to acquire an outstanding title. The title of the owner was extinguished by the sale. His right to redeem was cut off by the notice given pursuant to section 12 of the act, and as the county of Ulster had become the owner, there was nothing to prevent the wife of the tenant from becoming the purchaser. (*Senior agt. Marcinkowski, ante, 581.*)

TITLE.

1. By section 7 of chapter 260 of the Laws of 1881, the county treasurer of Ulster county was "empowered to acquire and hold" any lands which were sold for taxes, "and after the two years for redemption has expired, * * * to sell and convey the premises as such section directs." Where the county treasurer of Ulster county did "acquire and hold" the premises described in the complaint, under and in pursuance of the act aforesaid, and after the expiration of two years conveyed the same to the wife of the tenant occupying the premises:

Held, that a tenant is authorized as against his landlord to acquire an outstanding title. The title of the owner was extinguished by the sale. His right to redeem was cut off by the notice given pursuant to section 12 of the act,

and as the county of Ulster had become the owner, there was nothing to prevent the wife of the tenant from becoming the purchaser. (*Senior agt. Marcinkowski, ante, 581.*)

2. The Mohawk river is a navigable stream, and the title to the bed of the river is in the people of the state, and the decedent's title to land described as extending to the "Mohawk river" extends only to its bank. (*Jones agt. Jones, ante, 510.*)

3. Claus Bulwinkel, the owner of four lots on Fifth avenue, New York city disappeared, having made a mortgage thereon which, on the 22d day of August, 1862, was foreclosed and the summons published against him. The lots were sold under a judgment for their sale in this action. Six years thereafter the purchasers, through proceedings, in foreclosure of said mortgage by an advertisement under the statute, sold two of the lots, and they bringing more than sufficient to pay the mortgage, the other two lots now in question were not sold, but a quit-claim deed thereof was given to the heirs of said Bulwinkel. (*Seligman agt. Sonneborn, ante, 465.*)

4. One of these heirs thereupon commenced an action in partition alleging that on or about the day of 1863, Claus Bulwinkel departed this life, and stating who were his heirs, but on the trial or hearing no attempt was made to prove the death, or that the said parties were the heirs. The judgment, however, treated the same as proved, and at the sale by a referee the plaintiff became a purchaser and took title, all the parties to the partition action also conveying their rights and interests to the plaintiff. On the 23d day of July, 1883, the plaintiff contracted to sell the two lots to the defendant for \$22,500. (*Id.*)

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5. The defendant refused to take title, because Claus Bulwinkel had not been made a party to the action, or appeared therein; that there was no proof that he was dead, or died intestate, or that the parties in said partition suit were seized of the lots, and that the court acquired no jurisdiction over Claus Bulwinkel, and that the sale to plaintiff was void. (*Id.*)
6. Evidence of the omitted facts in the partition suit was given on the trial of this action, among other things, that Claus Bulwinkel left New York city in the year 1860. In November, 1862, his relatives read an account of the massacre of emigrants in the southwest August 9, 1862, and among the killed a gentleman from New York city describing said Bulwinkel, the relatives testifying that they had not heard from him and that it was the common report that he had been killed by the Indians and was dead:
Held, that by the statute he was presumed to be dead on the 9th day of August, 1869, seven years from the date of his reported death. (*Id.*)
7. That the evidence was sufficient to prove the particular date of death to be August 9, 1862, seven years before, and that he did not live during seven years (*Citing and commenting on the cases and what facts are sufficient proof of death at a particular time*). (*Id.*)
8. That the foreclosure action was commenced at a time when he was dead and had been buried thirteen days; that the judgment entered was void; that no title passed under it, the same being in the heirs. (*Id.*)
9. That the partition suit was begun seven years after Claus Bulwinkel would be presumed to be dead by the statute, independent of the evidence of the direct proof of his death. (*Id.*)
10. That the defect of evidence might have been supplied in that suit by opening the proceedings, but that the heirs being all of full age, and having, on the 5th day of January, 1872, conveyed by deed to the plaintiff all their right, title and interest in the lots, he had a good title, independent of the partition sale, and the defendant was bound to take it. (*Id.*)

See WILL.

White agt. *Kane*, ante, 382.

TRUSTEES.

1. The surrogate has authority, in appointing successors to testamentary trustees, to require them to give security for the faithful discharge of their duties. (*In the Estate of John Whitehead, deceased*, ante, 90.)

See CORPORATIONS.

Hailead agt. *Dodge*, ante, 170.

UNDERTAKING.

1. In an action against the sureties on an undertaking on arrest, where the nature of the cause of action and the right to the order of arrest are identical, commenced upon the vacating of the order of arrest, but before the termination of the action in which the order of arrest was granted:

Held, that the sureties were not liable on the undertaking until judgment was rendered in the action for defendant.

Also, *held*, that the undertaking carefully distinguishes between the cases where the right to arrest is identical with, and those where the right to arrest is extrinsic the cause of action; that in the one case the right to the order is determined by the fact that the plaintiff recovered judgment; in the other, the right to the order of arrest is determined upon motion,

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and if the vacated order is unreversed, it is a "final decision that the plaintiff was not entitled to the order of arrest" (*Schuyler* agt. *Englert*, 14 *Weekly Dig.*, 571, followed). (*Staab* agt. *Shupe*, ante, 4.)

2. An undertaking on appeal to the court of appeals must be executed by at least two sureties; the appellant cannot himself be one of the sureties, nor can the approval by a judge of a guaranty company under chapter 486, Laws of 1881, take the place of the two sureties. This reverses the judgment of the general term, rendered in *Hurl* agt. *Hannibal and St. Joseph R. R. Co.* (67 *How.*, 516). (*Nichols* agt. *McLean*, ante, 370.)

3. An undertaking executed only by the appellant and the Fidelity and Casualty Company, with no other surety, is insufficient. (*Id.*)

See SURETIES.

Hooker agt. *Townsend*, ante, 107.

UNITED STATES COURT.

See PRACTICE.

Matter of Fiske, ante, 432.

VERIFICATION.

1. Answer — the verification thereof may be omitted in an action charging the defendant with keeping a bawdy-house. (*Anderson* agt. *Doty*, 38 *Hun.*, 238.)

WILL.

1. A subscription without a seal is a valid execution of a will relating to real and personal estate. (*Matter of the Petition of Phillips* agt. *Phillips*, ante, 291.)
2. The testator's acknowledgment, in the presence of the attesting

witness, that the instrument presented for attestation was his last will and testament, connected with the fact that his signature had then been made was then seen by each attesting witness, each knowing his handwriting, was a sufficient acknowledgment of the genuineness of the signature and a perfect identification thereof. (*Id.*)

3. It is unnecessary that the acknowledgment be made in the presence of both of the attesting witnesses at the same time, but it is sufficient to make it to them severally. It is also unnecessary for the attesting witnesses to sign in the presence of each other. (*Id.*)

4. Where a testator declared to his subscribing witnesses severally that the instrument by him previously subscribed was his last will and testament; it was a sufficient acknowledgment. The subscribing witnesses having each seen the testator's subscription at the end of the will before the instrument was declared, and knowing his handwriting, it was a perfect identification of the written words. (*Id.*)

5. The attestation clause, usually signed by the attesting witnesses, is no part of the will, and it is legally executed without the addition of such a clause if the witnesses attest in the manner and form prescribed by the statute. (*Id.*)

6. Where the acknowledgment by the testator of his signature and the attesting by the subscribing witness were simultaneous acts, it satisfies the reason of the statute, and is a sufficient compliance therewith. (*Id.*)

7. A testator directed that a certain legacy should be paid "as soon as practicable," after his death. By a later article of his will he made a trust provision in favor of

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another beneficiary, directing that such trust be established "as soon as possible," after his death, and that interest beginning at his death, be paid to the beneficiary; but he provided that such trust should not be set up until after the payment of the legacy first referred to:

Held, that upon such legacy interest did not begin to run until a year after the death of the testator. (*In the Estate of Morgan L. Savage, ante, 379.*)

8. A devise was as follows: "After all my lawful debts are paid and discharged, I give, devise and bequeath all my estate, real, personal or mixed, to my wife L. E. W.:"

Held, that though the real estate stands charged with the debts of the testator, yet as the charge is general, the devisee, after the expiration of the statutory lien of three years, can give a good title to purchasers unincumbered by such debts. (*White agt. Kane, ante, 383*)

9. The widow was made sole executrix, but there was no mention of dower in the will.

Held, that the assertion of her right to dower in the account filed by her before the surrogate cannot be construed into an election to take her dower in the place of the devise. (*Id.*)

10. By the provisions of section 1866 of the Code of Civil Procedure a devisee in a will is vested with the right to bring his action to determine the true effect and meaning of a devise to him of real estate; and he has a right to require, by action brought for that purpose, the judgment of the supreme court, as to the intent and meaning of a testator in making a testamentary disposition of real estate, so far as the same involves the interests of the devisees. (*Jones agt. Jones, ante, 510.*)

11. To make the declaration required by the statute as to wills no form of words are essential, but what is required is that the witnesses shall be given to understand by words or acts by the decedent that the proposed instrument is intended as a will; the legislature only meant there should be some communication to the witnesses indicating that the testatrix intended to give effect to the paper as her will. Any communication of this idea, or to this effect, will meet the object of the statute. (*Matter of the Application for Probate of Will of Eliza B. Beckett, deceased, ante, 391.*)

WITNESS.

1. A cross-examining counsel should not be allowed to go into matters not involved in the suit and which are wholly immaterial in the case for the purpose of impeaching a party or witness. In order to impeach a witness out of his own mouth the questions must be confined to material matters in the case about which the witness has testified. (*Cropey agt. Perry, ante, 40.*)
2. In the trial of a proceeding for the probate of a decedent's will, one who is named as legatee in the disputed paper is incompetent, under section 829 of the Code of Civil Procedure (save in the cases therein excepted), to testify in his own interest concerning a personal transaction or communication between himself and the decedent. (*In the Estate of Ann Voorhis, deceased, ante, 261.*)
3. Testimony as to a personal transaction with a deceased person—Code of Civil Procedure, sec. 829. (*See Kelly agt. Burroughs, 33 Hun, 368.*)
4. What testimony of a party is inadmissible as relating to a personal

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- transaction with a deceased person— Code of Civil Procedure, sec. 829. (*See Price* agt. *Price*, 83 *Hun*, 69.)
5. A judgment creditor does not claim or hold an interest under the debtor within the meaning of section 829 of the Code of Civil Procedure. (*See Gillies* agt. *Krusdor*, 83 *Hun*, 814.)
6. When an administrator is debarred from testifying by section 829 of the Code of Civil Procedure. (*See Poucher* agt. *Scott*, 83 *Hun*, 323.)
7. When the declaration of a third person is admissible as against one accused of crime— witness— his credibility may be impeached by proof of conviction of any crime— Penal Code, sec. 714. (*See People* agt. *Burns*, 83 *Hun*, 296.)
8. The answer of a witness to a question as to his motive in testifying, may be contradicted by further proof offered by the party asking the question. (*See Burgess* agt. *N. Y. C. and H. R. R. R. Co.*, 84 *Hun*, 333.)

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